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90-1246

No.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JOSE ROBERTO CANAS-SEGOVIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The Refugee Act of 1980 requires an alien seeking asylum to demonstrate "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42), 1158(a). The Act requires an alien seeking withholding of deportation on similar grounds to demonstrate that his "life or freedom would be threatened in [the country designated for deportation] on account of" one or more of the same five bases. 8 U.S.C. 1253(h)(1). The question presented is whether a foreign country's enforcement of a conscription law against conscientious objectors to military service constitutes persecution or a threat to life or freedom "on account of" religion or political opinion.

PARTIES TO THE PROCEEDING

Petitioner is the Immigration and Naturalization Service. Respondents are Jose Roberto Canas-Segovia and Oscar Iban Canas-Segovia.

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JOSE ROBERTO CANAS-SEGOVIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-25a, is reported at 902 F.2d 717. The opinion of the Board of Immigration Appeals, App., *infra*, 27a-52a, is reported as Interim Decision No. 3074. The oral opinion of the Immigration Judge, App., *infra*, 53a-59a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1990. A petition for rehearing was denied on October 9, 1990. App., *infra*, 26a. On De-

cember 28, 1990, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 6, 1991.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Refugee Act of 1980, added to the Immigration and Nationality Act of 1952 as Sections 101(a)(42), 208(a), and 243(h), and codified at 8 U.S.C. 1101(a)(42), 1158(a), and 1253(h), are reproduced at App., *infra*, 60a-62a.

STATEMENT

The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, authorizes asylum and withholding of deportation for refugees persecuted because of their race, religion, nationality, membership in a particular social group, or political opinion. Specifically, eligibility for asylum is limited to any alien the Attorney General determines to be "a refugee within the meaning of section 1101(a)(42)(A) of this title," 8 U.S.C. 1158(a); "refugee" is defined to mean any person who is unwilling to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A). Eligibility for withholding of deportation is likewise limited to any alien whose "life or freedom would be threatened in [the country designated for deportation] on account of" the same five bases. 8 U.S.C. 1253(h)(1).

Respondents Jose Canas-Segovia and Oscar Canas-Segovia left their native El Salvador for the United States a few years before they reached the age at which they would have been subject to conscription. In their deportation proceeding, respondents applied

for asylum and withholding of deportation on the ground that they were conscientious objectors to military service. Respondents contended that because El Salvador did not exempt conscientious objectors from its conscription law, enforcement of that law threatened persecution on account of their religion and political opinion.

The Immigration Judge and the Board of Immigration Appeals denied the requested relief because El Salvador's conscription law applied uniformly to all draft-age males and was enforced without regard to draftees' religious or political beliefs.

The Ninth Circuit reversed. It held that enforcement of a mandatory conscription law constitutes persecution "if the refusal [to perform military service] is based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience." App., *infra*, 16a. The court of appeals held that proof of El Salvador's intent to persecute conscientious objectors because of their religious or political beliefs was not a precondition to relief under the Refugee Act; rather, it is "merely one relevant consideration in the analysis of an asylum claim." *Id.* at 17a.

1. The definition of "refugee" in the 1980 Refugee Act originated in the 1946 Constitution of the International Refugee Organization (IRO). See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 437 (1987). Responding to persecution perpetrated by the fascist powers before and during World War II, the IRO defined as "refugees" those persons who were outside their native country and were "victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war"; "Spanish Republicans and other victims of the Falangist regime in Spain"; and "persons who were considered refugees before

the outbreak of the second world war, for reasons of race, religion, nationality or political opinion." IRO Constitution, Annex 1, Pt. 1, § A1(a)-(c), 62 Stat. 3037, 3049. The IRO also defined as refugees "persons of Jewish origin or foreigners or stateless persons" who were returned to their native country by "enemy action" and became "victims of nazi persecution." IRO Constitution, Annex 1, Pt. 1, § A3, 62 Stat. 3049-3050. The IRO allowed refugees to decline to be repatriated to their native country if, among other reasons, they claimed "persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions." IRO Constitution, Annex 1, Pt. 1, § C1(a)(i), 62 Stat. 3050.

The IRO definition of refugee was incorporated in the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. By addressing the status of refugees generally, the Convention was intended to eliminate the need for ad hoc agreements in response to specific refugee crises. *Ibid.* The Convention's preamble "affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." *Ibid.* Like the IRO, the Convention sought to help those persons whose rights and freedoms were endangered because of their race, beliefs, or nationality. Article 1 defined "refugee" to mean any person who, as a result of events before January 1, 1951, is outside his native country "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." 189 U.N.T.S. 152. Article 33.1 prohibited the return of a refugee "to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership

of a particular social group or political opinion." 189 U.N.T.S. 176.

The Convention's definition of "refugee" was revised in the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 6225, T.I.A.S. No. 6577, to apply to persons who became refugees after January 1, 1951.

The United States acceded to the Protocol in 1968. 19 U.S.T. 6257. In 1980, Congress, in enacting the Refugee Act, conformed the definition of "refugee" in United States immigration law to that in the 1967 Protocol. See, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. at 436-437; S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979); S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 19 (1980).

2. Respondents are two brothers who left their native El Salvador a few years before they would have been drafted under that country's military conscription law. At the time of their departure, respondents were studying to become Jehovah's Witnesses. Jehovah's Witnesses are forbidden by their tenets to take up arms or assist the armed forces as non-combatants. El Salvador requires all men between the ages of 18 and 30 to serve in its armed forces; no exception is made for conscientious objectors. The penalty for refusing to serve is a term of imprisonment.[1] App., *infra*, 2a-3a.

3. Respondents were apprehended for entering the United States without inspection. In a joint deporta-

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[1] The term of imprisonment is unclear. Before the Board of Immigration Appeals, respondents cited a Library of Congress report stating that the punishment for draft resistance is one to three years' imprisonment. App., *infra*, 49a n.13. The court of appeals indicated, without citation to authority, that the legal penalty for draft resistance ranges "from six months to 15 years imprisonment, depending upon individual circumstances." *Id.* at 3a.

tion hearing, respondents conceded their deportability and requested asylum and withholding of deportation. App., *infra*, 54a.

The Immigration Judge found credible respondents' testimony that they adhered to the principles of the Jehovah's Witness Church and that Jehovah's Witnesses may not take up arms or kill another human being. App., *infra*, 54a-55a. He also observed that "[t]here is no suggestion by counsel or the respondents that El Salvador in any way persecutes Jehovah's Witnesses as to their religious activity." *Id.* at 56a.

On those facts, the Immigration Judge denied the requested relief. He noted that under the Refugee Act of 1980, "an individual must show he will be singled out for persecution *because* of one of the five statutory reasons." App., *infra*, 57a-58a. Since "[t]he record shows that El Salvador's draft laws apply to all persons equally," the Immigration Judge reasoned that neither conscription of respondents nor their punishment for draft evasion "can be considered 'persecution.'" *Id.* at 58a-59a. The Immigration Judge noted that 39 countries do not exempt conscientious objectors from military service, and the failure to provide an exemption "does not indicate * * * that these governments are singling out persons of conscience for persecution." *Id.* at 58a.

4. The Board of Immigration Appeals (BIA) dismissed respondents' appeal. The BIA sustained the Immigration Judge's factual determinations that respondents were bona fide Jehovah's Witnesses, App., *infra*, 37a, that Jehovah's Witnesses may not render military service, *ibid.*, and that El Salvador's conscription law does not discriminate against consci-

entious objectors on its face or as administered in practice, *id.* at 45a.[2]

Because El Salvador requires all draft-age males to render military service without regard to an individual's religious or political beliefs, the BIA reasoned that its application to respondents would not constitute persecution "on account of" religion within the meaning of the Refugee Act. The BIA stated that "a reasonable person in the position of the respondents might fear prosecution for a refusal to perform military service, but would not believe that he had been punished on account of his religious beliefs where the same penalties are applied to all violators, regardless of the reasons for the refusal to serve. Respondent Oscar Canas[-Segovia] himself testified that he did not think the Salvadoran military would care about his religious beliefs and stated that what they did care about was 'pick[ing] up people for fighting.'" App., *infra*, 46a. "Since the respondents have not shown that the Salvadoran government is inclined to persecute Jehovah's Witnesses or that the government is aware of the respondents' religious beliefs, * * * any punishment imposed would relate to the respondents' ultimate choice not to serve in the military, rather than the reasons or beliefs underlying the respondents' choice. In this regard, the re-

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[2] [T]here is nothing in this record which indicates that the Salvadoran conscription law does not offer exceptions from mandatory service to conscientious objectors because the intent of the law is to persecute Jehovah's Witnesses, or members of any other religious group which is opposed to military service and war. Nor is there evidence that the conscription laws were enacted or are applied in a discriminatory manner; (e.g., with only those with religious objections being punished for their refusal to join the military).

App., *infra*, 45a.

spondents have not demonstrated that the Salvadoran government would regard the fact that the respondents have religious reasons for their refusal to serve in the military as anything but a matter of coincidence." *Id.* at 47a-48a.[3]

The BIA declined to accept the advice of the United Nations High Commissioner for Refugees—"that persons such as the respondents 'may be accorded refugee status,' " App., *infra*, 42a—because neither the Protocol nor the practice of the signatories held conscientious objectors to be refugees, *id.* at 43a; because the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979) (App., *infra*, 63a-66a) was "ambiguous," *id.* at 42a-43a; and because the High Commissioner had taken inconsistent positions on whether conscientious objector status alone qualifies a person for refugee status, *id.* at 40-41 n.5.

The BIA also rejected respondents' alternative contention that they have a well-founded fear of persecution based on imputed political opinion. App., *infra*, 49a-50a. Respondents did "not base their 'imputed political opinion' argument on their particular circumstances but contend that any male who refuses to perform military service in El Salvador is subject to extra-judicial sanctions including torture and death." *Id.* at 49a. The BIA did not credit respondents' speculation that El Salvador would persecute them based on the mistaken assumption that they are guerrilla sympathizers:

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[3] Although the BIA construed the Refugee Act to require proof that persecution is "on account of" one of the five statutory bases, it pointed out that "[a]sylum applicants need not prove a government's 'subjective' intent to persecute, although there may be evidence of such intent in some cases. Reasonable inferences can be drawn from governmental or individual actions." App., *infra*, 47a n.11.

> With regard to the respondents in this case, it is not reasonable to suggest that the Salvadoran government, or forces beyond that government's control, would view the respondents as subversives or guerrillas, and that the respondents would then incur the risk of punishment or harm to which subversives and guerrillas in El Salvador are exposed. The respondents here are pacifists; the government may well inquire as to the reasons for the respondents' refusal to serve in the military, but would then discover that the respondents' objection to conscription was based on their religious beliefs. The government might then proceed to punish the respondents, in accordance with its conscription law, but there is no sound reason to believe that the government would view these respondents as possible military opponents. We therefore find no merit to the respondents' "imputed political opinion" argument.

Id. at 50a.

5. The Ninth Circuit reversed and found respondents eligible for both asylum and withholding of deportation. It concluded that enforcement of a mandatory conscription policy persecutes bona fide conscientious objectors both "on account of" their religion and "on account of" a political opinion (of neutrality) imputed to them by the government. App., *infra*, 1a-25a.[4]

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[4] The court stated that "because the facts are undisputed," remand to the BIA "for application of the identified legal standards * * * would serve no purpose." App., *infra*, 20a.

One found eligible for withholding of deportation is entitled, without more, to that relief. One found eligible for asylum may still be denied that status in the discretion of the Attorney General. See *INS* v. *Cardoza-Fonseca*, 480 U.S. at 428 n.5; *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

The court of appeals rejected at the outset the notion that it should defer to the BIA's interpretation of the Refugee Act, stating that "[t]he judiciary is the final authority on issue [sic] of statutory construction." App., *infra*, 6a n.6 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. at 446-448). The court then criticized the BIA's reliance on "the facially neutral characteristics of the Salvadoran conscription policy." App., *infra*, 10a. Drawing an analogy to some of this Court's cases interpreting the First Amendment's Free Exercise Clause, see *id.* at 11a (citing *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Thomas* v. *Review Board*, 450 U.S. 707 (1981); and *Sherbert* v. *Verner*, 374 U.S. 398 (1963)), the court of appeals said that the BIA's reasoning "ignores an elementary tenet of the United States constitutional law, namely, that a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons," App., *infra*, 10a. The court "conclude[d] that the mere facial neutrality of the Salvadoran conscription policy does not preclude it from amounting to persecution under the INA." *Id.* at 11a.

To determine which conscientious objectors qualify as refugees, the court turned to the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979). App., *infra*, 13a. The court recognized that "[n]o specific provision is made for conscientious objectors within the INA or the UN Protocol." *Id.* at 12a. But it found the *Handbook* to be "authoritative on the subject." *Id.* at 13a. Based on its reading of certain paragraphs of the *Handbook* (*reprinted at* App., *infra*, 63a-66a), the court held that "persecution arises whenever [one's] conscience is overcome by force or punishment meted out for the refusal to betray it," *id.* at 16a. Accordingly, the

court held that "punishment of a conscientious objector for refusal to comply with a policy of mandatory conscription" constitutes "persecution * * * if the refusal [to render military service] is based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience." *Ibid.*

Continuing its focus on the burden on the conscientious objectors' belief, the court rejected the notion that the Refugee Act requires respondents "to demonstrate motive or intent to persecute on the part of the Salvadoran government." App., *infra*, 17a. In the court's view, "[i]ntent or motive to persecute is merely one relevant consideration in the analysis of an asylum claim," and the BIA committed reversible error when it "transformed these relevant factors into requirements." *Ibid.*; see *id.* at 19a & n.21.

Applying its burden analysis to the undisputed facts, the court held that respondents were eligible for asylum and withholding of deportation. The court observed that if respondents "refuse[] to do military service then they will go to prison. Any reasonable person in this position would conclude that the punishment would be on account of his religious beliefs." App., *infra*, 20a.

In the alternative, the court determined that the government of El Salvador would impute to respondents a political opinion in opposition to the government. According to the court, respondents' "refusal to do military service because of their religious beliefs also necessarily places them in a position of political neutrality in the Salvadoran civil conflict." App., *infra*, at 23a. The court spoke approvingly of the argument that "a refusal to bear arms is a uniquely political statement" which "requires the viewing of any conscientious objection to military

service as an inherently political opinion." *Id.* at 23a & n.23. Because "persons who refuse to comply with the Salvadoran conscription policy are exposed to severe dangers, including torture and death," the court concluded that respondents would suffer "persecution on account of imputed political opinion." *Id.* at 23a.

Judge Leavy concurred in the grant of relief on the ground that respondents faced persecution on account of an imputed political opinion. App., *infra*, 25a. He disagreed with the majority's holding with respect to religious persecution, however, "because it treats as irrelevant the motive of the persecutor." *Ibid.* That conclusion, according to Judge Leavy, "conflicts with the statutory 'on account of' language, which clearly refers to the underlying motives or reasons behind the persecution." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's holding in this case—that conscripting bona fide conscientious objectors constitutes persecution "on account of" religion within the meaning of the Refugee Act—conflicts with the decision of the en banc Fourth Circuit in *M.A. A26851062* v. *INS*, 899 F.2d 304 (1990). The Ninth Circuit's additional holding—that punishment of draft resisters constitutes persecution "on account of" an imputed political opinion of opposition to the government—also conflicts with the Fourth Circuit's decision in *M.A.*

Both bases for the Ninth Circuit's decision effectively eliminate the Refugee Act's requirement that persecution (or a threat to life or freedom) must be "on account of" religion, political opinion, or one of the other statutory bases. That phrase requires proof, direct or circumstantial, that the persecutor's threat

is motivated by the victim's race, religion, nationality, membership in a particular social group, or political opinion.

By removing the statutory intent requirement, the Ninth Circuit has made eligibility for asylum and for withholding of deportation turn entirely on the degree of the applicant's fear of threatened harm ("reasonable," with respect to asylum, and "more likely than not," with respect to withholding of deportation, App., *infra*, 8a), without regard to the reason for the threat. Awarding refugee status based solely on the threat of harm would convert the refugee provisions into a source of potential relief for all of those seeking to escape domestic strife in other lands and might well create a backlash against true refugees—*i.e.*, those persons fleeing from a threat of persecution based on their race, beliefs, or nationality.

1. The Ninth Circuit's decision conflicts with the contemporaneous decision of the en banc Fourth Circuit in *M.A. A26851062* v. *INS*, 899 F.2d 304 (1990). Like respondents, M.A. is a citizen of El Salvador who left that country to avoid serving in its armed forces. *Id.* at 305-306. Like respondents, M.A. is a conscientious objector. *Id.* at 306. While respondents are religious conscientious objectors, M.A. is a "conscientious political object[or]" based on perceived atrocities committed by the armed forces of El Salvador. *Ibid.* M.A. also claimed that he would be "tortured and possibly killed as an opposition sympathizer" if forced to return to El Salvador. *Ibid.*[5] The BIA, consistent with its decision in this

[5] Indeed, unlike respondents here, M.A. offered evidence that he himself had been threatened by a civilian patrol and had been twice beaten by soldiers. 899 F.2d at 306.

case, held in *M.A.* that "it is not persecution for a country to require military service of its citizens." *Ibid.*

The en banc Fourth Circuit affirmed the BIA's decision. 899 F.2d at 316. It noted that the "Refugee Act tightly defines the parameters of cognizable persecution. It allows eligibility for political asylum only if the persecution M.A. fears takes place 'on account of' his 'race, religion, nationality, membership in a particular social group, or political opinion.'" *Id.* at 311 (quoting 8 U.S.C. 1101(a)(42)(A)); see 899 F.2d at 315. The Fourth Circuit held that the BIA

> properly focused upon the fact that, at bottom, M.A. was a draft resister who claimed that his justified refusal to serve in the Salvadoran military would result in his persecution. International law and Board precedent are very clear that a sovereign nation enjoys the right to enforce its laws of conscription, and that penalties for evasion are not considered persecution.

899 F.2d at 312. Noting the "incentives for draft-age males to raise asylum claims," *id.* at 315, the Fourth Circuit concluded that M.A.'s "status as a political 'neutral' is * * * irrelevant," *ibid.*, because he "has brought forward no evidence to show that the persecution he fears—if indeed the object of his fear can appropriately be called persecution, rather than random violence—has anything to do with his 'neutral' political opinions." *Id.* at 316.[6]

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[6] The dissenting judges, relying on the same paragraphs of the *Handbook* as did the Ninth Circuit, see 899 F.2d at 321, criticized the majority for "virtually eliminat[ing] the recognition of conscientious objection as a basis for political asylum." *Id.* at 321-322.

M.A. would undoubtedly have been granted relief in the Ninth Circuit. First, in view of his sincere political beliefs, M.A. would have been granted relief as a political conscientious objector. The Ninth Circuit in this case "h[e]ld that punishment of a conscientious objector for refusal to comply with a policy of mandatory conscription may amount to persecution within the meaning of the INA, if the refusal is based upon genuine *political*, religious, or moral convictions, *or other genuine reasons of conscience*." App., *infra*, 16a (emphasis added).[7]

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[7] Later in its opinion, the Ninth Circuit attempted to distinguish the BIA's decision in *M.A.* on the grounds that M.A.'s evidence did not link refusal to do military service with torture and death, and that M.A. did not raise a claim of *religious* persecution. App., *infra*, 22a (discussing *Matter of A-G*). Neither of these grounds can be sustained. With respect to the second, the Ninth Circuit's holding expressly extends relief to political conscientious objectors; no basis for distinguishing political from religious conscientious objectors appears in the opinion. See *Barraza Rivera* v. *INS*, 913 F.2d 1443, 1450-1451 (9th Cir. 1990) (*Canas-Segovia* "defined conscientious objector in the asylum context broadly," beyond the "traditional form of conscientious objection" based on "religious grounds") ; cf. *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring in result) ; Cohen & Greenspan, *Conscientious Objection, Democratic Theory, and the Constitution*, 29 U. Pitt. L. Rev. 389, 403 (1968) ; Mansfield, *Conscientious Objection—1964 Term*, 1965 Relig. & Pub. Ord. 3, 76.

Nor would M.A.'s supposedly lesser evidence of threatened harm (but see note 5, *supra*) dictate a different outcome. The question in these cases is not whether the threat of harm is credible but whether it is "on account of" religion or political opinion. M.A. (like respondents) faces imprisonment for draft evasion. Under the Ninth Circuit's reasoning, that punishment is "on account of" religion or political opinion; under the Fourth Circuit's reasoning, it is not.

Second, the Ninth Circuit would have granted M.A. relief based on a political opinion of neutrality imputed to M.A. by the government. Even more than respondents' "refusal to do military service because of * * * religious beliefs," M.A.'s refusal to serve because of political beliefs places him "in a position of political neutrality in the Salvadoran civil conflict." App., *infra*, 23a. Under the Ninth Circuit's reasoning, "[s]uch a perspective naturally requires the viewing of *any* conscientious objection to military service as an inherently political opinion." *Ibid.* (emphasis added). This analysis is as applicable to M.A. as to respondents.[8] Apart from the differing constructions of the Refugee Act adopted by the Ninth and Fourth Circuits, there is no basis for explaining respondents' eligibility for asylum and withholding of

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[8] It also conflicts in principle with decisions of the First and Eleventh Circuits requiring proof that persecution is intended to punish a political opinion. See *Umanzor-Alvarado* v. *INS*, 896 F.2d 14, 15 (1st Cir. 1990) ("Insofar as this evidence shows that the Government [of El Salvador] may punish [the applicant] simply because he will not serve in the Army, however, it does not show that the Government will *persecute* him because of his *political opinion*."); *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292, 1299 (11th Cir. 1990) ("Escobar may well fear persecution on account of what he believes to be political opinion. However, in the context of civil war where fear permeates the life of every citizen, the motivation of the persecutor becomes the linchpin of the analysis."); see also *Alvarez-Flores* v. *INS*, 909 F.2d 1, 8 n.6 (1st Cir. 1990) (noting that in view of the conflicting analyses in *Perlera-Escobar* and in the decision in this case, the Ninth and Eleventh Circuits "appear divided on the issue" whether "persecution on account of political neutrality requires that the intention of the *persecutor* be the 'linch-pin' of the analysis").

deportation, on the one hand, and M.A.'s deportation to El Salvador, on the other.[9]

2. The Ninth Circuit's determination that "[i]ntent or motive to persecute is merely one relevant consideration" rather than, as the BIA held, a precondition for asylum and withholding of deportation, App., *infra*, 17a, ignores the "on account of" requirement in the Refugee Act and fails to give deference to the reasonable interpretation of that phrase by the BIA.

a. As Judge Leavy explained in his separate concurrence, "the statutory 'on account of' language * * * clearly refers to the underlying motives or reasons behind the persecution." App., *infra*, 25a. A "well-founded fear of persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1101(a)(42)(A) (emphasis added), and a "threat[]" to 'life or freedom * * * on account of" the same beliefs or characteristics, 8 U.S.C. 1253(h)(1), plainly requires an *intent* to discriminate against a person because of one or more of those beliefs or characteristics. When the question involves persecution "on ac-

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[9] M.A. first applied for asylum in his motion to reopen his deportation proceeding, 899 F.2d at 307, and thus the question in the Fourth Circuit was whether the BIA had abused its discretion, *id.* at 310. But that procedural posture would not have barred an award in the Ninth Circuit. The BIA denied the motion to reopen based on M.A.'s "failure to establish prima facie eligibility" for relief. *Id.* at 308. Thus, the crux of the case was not whether M.A. faced a credible threat of punishment for draft evasion, but whether that punishment was "on account of" political opinion. See note 7, *supra*. The Ninth Circuit would not have reached a different result had it reviewed respondents' application under an abuse of discretion standard.

count of" a religious or political belief, refugee status requires more than a threat of harm and the notion that the threat burdens that belief.[10] The Ninth Circuit's reasoning that the motivation of the persecutor is "merely one relevant consideration," App., *infra*, 17a, would make refugee status available to one whose religion or political creed requires him to steal, and who fears that if he returns to his country, he will be arrested for stealing. The flaw in this analysis is evident: one whose religious or political beliefs subject him to the threat of penal laws that do not discriminate on the basis of those beliefs is simply not the victim of political or religious persecution. Cf. *Employment Div. Dep't of Human Resources* v. *Smith*, 110 S. Ct. 1595, 1600 (1990).

b. The international agreements from which the definition of "refugee" in the 1980 Refugee Act was drawn support the reading of "on account of" as a requirement of intent or motive. The 1946 IRO Constitution, the 1951 United Nations Convention, and the 1967 United Nations Protocol all require that persecution be "for reasons of," "based on," or "be-

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[10] Consistent with this analysis, commentators addressing the "on account of" language conclude that persecution under the INA requires a showing of "invidious persecution," Helton, *Persecution on Account of Membership in a Social Group As a Basis for Refugee Status*, 15 Colum. Hum. Rts. L. Rev. 39, 59 (1983), that the "alien [was] 'singled out' for persecution," Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 Md. L. Rev. 91, 124 (1986), or that "the persecutor seeks to punish [the alien] for holding a specific political belief," Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681, 700 (1989).

cause of" the victim's race, beliefs, or nationality. The drafters of these instruments had in mind the many victims of fascist racial and ideological persecution. Refugees, as defined by the examples in these instruments, see pp. 3-4, *supra*, were not just victims of war's dislocation; they were made to suffer for their race, their beliefs, or their nationality.

Courts of the United Kingdom (a party to the 1951 Convention) agree that eligibility for refugee status requires proof of the persecutor's intent. As Judge Kennedy of the Queen's Bench explained in *R* v. *Secretary of State for the Home Department ex parte Zia Mehmet Binbasi*, [1989] Imm AR 595: "In 1951 those who drafted the Convention were not seeking to guarantee all human rights. They had a more modest aim, namely to protect those who are genuinely fearful that if they returned to their homeland they will be persecuted simply because of who they are or what they have done." The Immigration Appeal Tribunal of the United Kingdom, interpreting the "for reasons of" language in the Convention as incorporated into British statutory law, accordingly rejected the asylum claim of a Jehovah's Witness who faced "a long term of imprisonment for contravention of the law on conscription" if he returned to his native Greece and refused to serve in its armed forces. The rationale of that tribunal is directly applicable to the situation faced by respondents:

> In our view there is no doubt that the appellant has a well-founded fear of being punished if he has to return to Greece. * * * The question remains: In this case is it persecution for reasons of religion or political opinion? We do not think that it is. The immediate cause of the persecution is a refusal to obey the law of the land, and the fact that such refusal may be due to religious

> beliefs or political opinion is in our view only the secondary cause. If the Jehovah's Witnesses in Greece were being persecuted for reasons of religion one would expect that their teachings and meetings would be proscribed. This is evidently not the case and they appear to be free to worship as they please. We do not consider that the relevant law is discriminatory, because it appears to us that other religious orders with similar views as to military service (Quakers for example) and indeed persons with no religious beliefs at all but whose conscience compelled them to refuse service, would all be treated in the same way. Looked at in this way the law in question does not discriminate against those breaking it any more than does the Theft Act in this country discriminate against thieves: and the fact that the only persons so affected happen to be Jehovah's Witnesses seems to us to be no more than a matter of geographical and cultural accident.

Doonetas v. *Secretary of State for the Home Department*, as quoted, approved, and applied to *Atibo* v. *Immigration Officer, London (Heathrow) Airport*, [1978] Imm. AR 93.

c. Congress would not have intended that, in circumstances such as these, religious or political conscientious objectors would qualify for asylum or withholding of deportation under the Refugee Act of 1980. Indeed, such a result is especially remarkable in view of the fact that this Court has never construed the First Amendment to require that conscientious objectors be exempted from military conscription. See *Gillette* v. *United States*, 401 U.S. 437, 461-462 (1971) ("Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding

duty fixed by a democratic government. * * * The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position."); *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring in result) ("Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors."); *Selective Draft Law Cases*, 245 U.S. 366, 378-390 (1918) ("[t]o do more than state the proposition is absolutely unnecessary"); cf. *Employment Div. Dep't of Human Resources* v. *Smith*, 110 S. Ct. at 1600. Under the Ninth Circuit's theory, members of American draft boards would be engaged in religious persecution [11] if they were required to administer a conscription law like that in effect in this country during World War I, since that law did not countenance a refusal, on any ground, to accept non-combatant service in support of the armed forces. Selective Draft Act of May 18, 1917, ch. 15, § 4, 40 Stat. 76, 78; *Selective Draft Law Cases*, 245 U.S. at 376.[12]

d. The Ninth Circuit's alternative holding—that respondents would suffer persecution on account of "imputed political opinion," App., *infra*, 21a—simply

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[11] See App., *infra*, 48a n.12; cf. 8 U.S.C. 1101(a)(42) ("refugee" does not include "any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion"); 8 U.S.C. 1253(h)(2)(A) (same with respect to withholding of deportation).

[12] The beliefs of Jehovah's Witnesses do not permit them to render such non-combatant service. See App., *infra*, 32a, 34a; R. 585.

seeks to convert conscientious objection (whatever the reason) from a basis of religious persecution to a basis for political persecution. Since it attempts to infer the alleged persecutors' intent solely from their enforcement of the conscription law, it is vulnerable on precisely the same ground as the principal holding —namely, that a facially neutral and uniformly applied conscription law does not persecute respondents "on account of" political opinion.

As Judge Leavy recognized in his separate concurrence, the "imputed political opinion" theory is wholly at odds with the majority's rejection of an intent requirement. By relying on an inference that the persecutor imputes to the victim a political opinion (of neutrality), the theory recognizes what the court below elsewhere denied—the centrality of the alleged persecutor's motivation.[13]

e. The Ninth Circuit erred in giving "authoritative" weight to the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979). App., *infra*, 13a. As the BIA correctly observed, some paragraphs of the *Handbook* suggest that religious conscientious objectors "may be able to establish a claim to refugee status," ¶ 172, while others imply the opposite, see ¶¶ 167, 173. See App., *infra*, 40a-44a. The United Nations High Commissioner for Refugees has himself appeared on both sides of the debate. In a February 15, 1982 letter, he opined:

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[13] The court also asserted that respondents would suffer "disproportionately severe punishment" for their refusal to be "forcibly conscripted," because respondents would be forced to "sacrifice their religion's fundamental principle of pacifism." App., *infra*, 22a-23a. This is simply another way of saying that, without regard to intent, even-handed enforcement of a nondiscriminatory law may so burden religious or political beliefs as to amount to persecution under the Act.

> Conscientious objectors may . . . be considered as refugees and be granted asylum *if they fulfill the normal criteria of refugee status*, i.e. if they have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. In applying these criteria to conscientious objectors, it should be borne in mind that fear of prosecution or punishment for objection to military service, desertion or draft evasion, is not a reason for granting refugee status unless there are also elements indicating a well-founded fear of persecution under the refugee definition.

App., *infra*, 40a-41a n.5 (emphasis added).

In any event, the *Handbook* is not law, see *INS* v. *Cardoza-Fonseca*, 480 U.S. at 439 n.22, and the Ninth Circuit erred in finding it to be "authoritative," App., *infra*, 13a, rather than simply to provide "significant guidance," *INS* v. *Cardoza-Fonseca*, 480 U.S. at 439 n.22. The silence of the Refugee Act and the Protocol on the eligibility of conscientious objectors for asylum and withholding of deportation leaves a gap to be filled not by the staff of an international agency but by the domestic agency responsible for administering the immigration laws. See *ibid.*

f. In light of the silence of the Refugee Act (and the international agreements as well) on the question of refugee status for conscientious objectors, the Ninth Circuit should have determined whether the BIA's interpretation of the "on account of" language was based on a permissible construction of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The Ninth Circuit plainly erred in reviewing the BIA's determination de novo. App., *infra*, 6a n.6. See generally *Pension Benefit Guaranty Corp.* v. *LTV*

Corp., 110 S. Ct. 2668, 2676-2681 (1990); *Fort Stewart Schools* v. *FLRA*, 110 S. Ct. 2043, 2046 (1990); *Sullivan* v. *Everhart*, 110 S. Ct. 960, 964 (1990); *Massachusetts* v. *Morash*, 490 U.S. 107, 114-118 (1989); *INS* v. *Cardoza-Fonseca*, 480 U.S. at 448; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 844.

3. The Ninth Circuit's principal holding in this case makes all conscientious objectors eligible for asylum and withholding of deportation as long their objection is "based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience." App., *infra*, 16a. Given the number of draft-age males in countries like El Salvador, and the "incentives for draft-age males to raise asylum claims," *M.A. A26851062* v. *INS*, 899 F.2d at 315, it is not unreasonable to expect a flood of such claims from those placed in deportation proceedings in the Ninth Circuit.

The troublesome implications of the Ninth Circuit's alternative holding are even more far-reaching. By suggesting that "a refusal to bear arms is a uniquely political statement" which "requires the viewing of any conscientious objection to military service as an inherently political opinion," and that punishment for that refusal is ipso facto "on account of" an imputed political opinion of neutrality, App., *infra*, 23a & n.23, the court has made relief available to any draft resister subject to punishment for refusing to serve.[14]

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[14] The number of aliens in a position to claim such relief is undoubtedly large. Over 60,000 aliens applied for asylum in 1988, more than twice as many as applied in 1987. *1988 Statistical Yearbook of the INS* at xxviii, Aug. 1989. Significantly, the number of asylum applications by Salvadorans increased from 2,684 in 1987, to 27,048 in 1988.

4. The importance of this case has not been diminished by passage of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. Section 303 of that Act provides "special temporary protected status" for Salvadorans who register by June 30, 1991. § 303(b)(1)(C), 104 Stat. 5036 (to be codified at 8 U.S.C. 1254a note). But that status expires 18 months after January 1, 1991, at which time Salvadorans registered under § 303 will be placed in deportation proceedings (unless the Attorney General designates El Salvador for temporary protected status under Section 302 of the Immigration Act of 1990). § 303(a)(2), (d), 104 Stat. 5036-5037.

The protected status afforded by the 1990 Act's moratorium on deportation is only temporary and is thus no substitute for withholding of deportation. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 100-101 (1983) (administrative moratorium on police chokehold for indefinite period did not moot challenge to practice). Moreover, temporary protected status is not the equivalent of asylum, since the Attorney General may adjust the status of an alien granted asylum to that of lawful permanent resident after one year. See 8 U.S.C. 1159; *INS* v. *Cardoza-Fonseca*, 480 U.S. at 427 n.3. Finally, the moratorium affects only Salvadorans, while the Ninth Circuit's rationale (as the Fourth Circuit's) is broadly applicable to any aliens seeking asylum or withholding of deportation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

No. 88-7444

INS Nos. A26-790-253, A26-790-255

JOSE ROBERTO CANAS-SEGOVIA;
OSCAR IBAN CANAS-SEGOVIA, PETITIONERS *

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

Petition for Review from the
Board of Immigration Appeals

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* Briefs of amici curiae in support of petitioners were filed for the Office of the United Nations High Commissioner for Refugees by *Guy S. Goodwin-Gill, Susan Timberlake,* United Nations High Commissioner for Refugees, Washington, D.C., and *Ralph G. Steinhardt,* George Washington University National Law Center, Washington, D.C.; and for Amnesty International U.S.C. by *Paul Hoffman,* and *David Weissbrodt,* AIUSA Legal Support Network, Amnesty International U.S.A., Los Angeles, California, and *Charles R. Dougherty* and *Neil V. McKittrick,* Hill & Barlow, Boston, Massachusetts.

Argued and Submitted
December 12, 1989—San Francisco, California

Filed April 24, 1990

Before: Eugene A. Wright, Procter Hug, Jr. and Edward Leavy, Circuit Judges.

Opinion by Judge Wright; Special Concurrence by Judge Levy

OPINION

WRIGHT, Circuit Judge:

We consider whether El Salvador's forcible conscription policy amounts to persecution under the Immigration and Nationality Act (INA) when applied to conscientious objector Jehovah's Witnesses. Both the immigration judge (IJ) and Board of Immigration Appeals (BIA) answered this query in the negative when they denied asylum and withholding of deportation relief to petitioners Jose and Oscar Canas-Segovia. We now REVERSE and REMAND with instructions to grant the requested relief.

BACKGROUND

Jose and Oscar Canas-Segovia (the Canases) are brothers and natives of El Salvador whose religious beliefs bar them from participating in military service. Both were introduced to the Jehovah's Witnesses faith as children and reared in a family setting where most family members either already were Jehovah's Witnesses or studying to be baptized into that faith. The Canases have studied the faith since their mid-teens, with the goal of becoming baptized and consider themselves to be Jehovah's Witnesses. The ten-

ets of their faith prohibit them from participating in military service of any kind.

El Salvador presently has a policy of mandatory military service for all males between the ages of 18 and 30. The Salvadoran policy does not exempt conscientious objectors, on religious grounds or otherwise, and offers no alternatives to military service. The legal penalties for resisting conscription range from six months to 15 years imprisonment, depending upon individual circumstances. Fear of this policy caused the Canases to flee El Salvador at the respective ages of 16 and 17.

The Canases entered the United States illegally on January 26, 1985. Two days later, they received orders to show cause why their illegal entry should not subject them to deportation. At a joint deportation hearing held in San Francisco on December 16, 1989, they submitted petitions for asylum pursuant to section 208 of the INA, codified at 8 U.S.C. § 1158(a).[1] Their petitions raised these grounds for asylum: (1) forcible conscription in violation of their religious beliefs amounted to religious persecution, (2) refusal to serve in the military, for any reason, would expose them to extra-judicial sanctions including torture and death, and (3) refusal to serve in the military could cause them to be viewed as political enemies of the government and again expose them to extrajudicial sanctions. Pursuant to 8 C.F.R. § 208.3 (b), the IJ automatically considered the petitions also as requests for withholding of deportation under sec-

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[1] For the purposes of ease of reading and judicial efficiency, parallel citations to both the INA section and U.S.C. section will appear only the first time a section is cited. Later citations will be only to the U.S.C.

tion 243(h) of the INA, codified at 8 U.S.C. § 1253 (h).

In support of their petitions, the Canases presented extensive evidence about the Salvadoran conscription policy and the consequences of refusing to submit to it. A few examples will suffice. Jose Canas testified that a friend who had fled from the military and returned to his neighborhood was taken away and not seen again. An affidavit was presented from an eyewitness to the extrajudicial torture of an Army deserter. The eyewitness, a conscript himself, first heard army officials accuse the deserter of being an antigovernment guerrilla and then watched as both of the deserter's arms were chopped off.

Affidavits and declarations were also presented by former Salvadoran military officers, a Red Cross physician working in the country, and members of the clergy working there. An affidavit from an expert on the human rights situation in El Salvador, George McHugh, stated that "[t]he government routinely rounds up youths at gun point. Those who refuse to join the armed forces for reasons of conscience are tortured and killed." [2]

The IJ denied the petitions for asylum and withholding of deportation and granted the Canases voluntary departure. In an oral decision, he reasoned that the Canases could not establish either a clear probability of persecution [3] or a well-founded fear of

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[2] Declaration of George McHugh, Record at 397.

[3] The "clear probability of persecution" standard is used in determining an alien's eligibility for withholding of deportation. *I.N.S. v. Stevic*, 467 U.S. 407, 424 (1984); *Blanco-Lopez v. I.N.S.*, 858 F.2d 531, 533 (9th Cir. 1988).

persecution [4] because they had failed to show that Jehovah's Witnesses are singled out by the Salvadoran government for persecution because of their religious beliefs.

The IJ considered a document from the United Nations High Commissioner for Refugees Office (UNHCR) in support of the Canases' claim. It cited to the *UN Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979) (Handbook). The IJ dismissed the document, saying that the Handbook was written before passage of the Refugee Act of 1980. Noting also that 39 other nations fail to provide for conscientious objector exemptions, he concluded that the Salvadoran policy of mandatory conscription could not amount to persecution because it applied equally to all Salvadorans without regard to religious beliefs. The Canases then appealed to the BIA.

That board affirmed the denial of asylum and withholding.[5] It emphasized that the Canases had failed to prove intent on the part of the Salvadoran government to single out Jehovah's Witnesses for persecution, and determined the Handbook provisions were not dispositive.

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[4] The "well-founded fear of persecution" standard is used in determining an alien's eligibility for asylum relief. *See* section 101(a)(2)(42) of the INA, codified at 8 U.S.C. § 1101(a)(42).

[5] Both the IJ and BIA focused on whether the Canases met the asylum standard of a well-rounded fear of persecution. Because they determined that the Canases failed to meet this standard, they a fortiori did not need to consider whether the Canases met the more difficult withholding of deportation standard that requires a clear probability of persecution.

It also rejected the Canases' argument that refusing to serve in the military would impute to them a political opinion hostile to the government, thereby exposing them to governmental reprisals including torture and death. Rejection of this argument was based upon a prior BIA decision in which a petitioner had failed to establish that mere failure to serve in the military would subject him to the attention of Salvadoran death squads.

This appeal followed.

STANDARD OF REVIEW

Our review is confined to the decision of the BIA. If its determination was correct, then any error by the IJ is harmless. *Rodriguez-Rivera v. U.S. Dep't. of Immigration & Naturalization*, 848 F.2d 998, 1003 (9th Cir. 1988).

We review factual findings underlying the BIA's denial of asylum and withholding of deportation relief under the substantial evidence standard. *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir. 1988); *Artiga Turcio v. I.N.S.*, 821 F.2d 1396, 1398 (9th Cir. 1987). The facts in our case were undisputed and the BIA decision turned solely on legal questions about the relevant statutory requirements. Our review is de novo. *Desir*, 840 F.2d at 723; *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1434 (9th Cir. 1987).[6]

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[6] The Government urges us to apply a deferential standard of review to the BIA's decision, arguing that we must defer to its interpretation of the statute. We reject this argument. As the Supreme Court noted in *Cardoza Fonseca*, "[t]he judiciary is the final authority on issue [sic] of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 480 U.S. 421, 446-48 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

STATUTORY FRAMEWORK

Both the asylum and withholding of deportation provisions were established by the 1980 Refugee Act in which Congress sought to bring United States refugee law into conformity with the United Nations Protocol Relating to the Status of Refugees (UN Protocol), 19 UST 6223, TIAS No. 6577. *See generally I.N.S. v. Stevic*, 467 U.S. 407, 421 (1984); *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 436-37 (1987). The UN Protocol, to which the United States acceded in 1968, binds parties to the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (1951 Convention), 189 U.N.T.S. 150 (July 28, 1951).[7]

An alien qualifies for discretionary granting of asylum relief under section 208(a) of the INA, codified at 8 U.S.C. § 1158(a), if he is a refugee within the meaning of section 101(a)(42) of the INA, codified at 8 U.S.C. § 1101(a)(42). That section, in relevant part, defines a refugee as:

> (A) any person who is outside any country of such person's nationality . . . , and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

8 U.S.C. § 1101(a)(42)(A).[8]

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[7] The United States is not a party to the 1951 Convention.

[8] The definition of refugee adopted by Congress in the aslyum section, and the bases of harm enumerated in the withholding section, are virtually identical to the definition of

The withholding of deportation provision, 8 U.S.C. § 1253(h), mandates that no alien shall be deported to a country in which his or her life or freedom would be threatened on account of any of five enumerated grounds. The section states in relevant part:

> The Attorney general shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h)(1).

An alien becomes eligible for withholding of deportation by demonstrating a "clear probability of persecution" on account of one of these five grounds. *Stevic*, 467 U.S. at 424; *Blanco-Lopez v. I.N.S.*, 858 F.2d 531, 533 (9th Cir. 1988). The "clear probability" standard inquires whether it is "more likely than not that the alien [will] be subject to persecution." *Stevic*, 467 U.S. at 414; *Blanco-Lopez*, 858 F.2d at 533. The standard may be satisfied by the alien's own credible testimony, and independent, corrobative evidence of persecution is unnecessary in light of such credible testimony. *Blanco-Lopez*, 858 F.2d at 533.

Although asylum and withholding of deportation relief are usually sought simultaneously, the two forms of relief differ in several respects. Withholding of deportation is mandatory once an alien establishes eligibility but the granting of asylum remains discretionary even after he establishes eligibility. *Compare* 8 U.S.C. § 1253(h) *with* 8 U.S.C. § 1158

"refugee" in the 1951 Convention. *Cardoza Fonseca*, 480 U.S. at 436-37.

(a); *see generally Cardoza Fonseca*, 480 U.S. at 428 n.6. The benefits also differ. Withholding of deportation only protects an alien from deportation to a specific country while asylum allows him to have his status adjusted to that of a lawful permanent resident.[9] *Cardoza Fonseca*, 480 U.S. at 428 n.6 (quoting *Matter of Salim*, 18 I & N Dec. 311, 315 (1982)). The clear probability of persecution standard required for withholding of deportation is more difficult to meet than the well-founded fear standard required for asylum. *Cardoza Fonseca*, 480 U.S. at 423, 450; *Stevic*, 467 U.S. at 425; *Blanco-Lopez*, 858 F.2d at 533.

ANALYSIS

This appeal presents four primary issues: (i) whether application of the Salvadoran conscription policy to the Canases is persecution under the INA; (ii) whether conscientious objectors may qualify for asylum and withholding of deportation relief; (iii) whether the BIA erred by requiring the Canases to demonstrate intent and motive to persecute by the Salvadoran government; and (iv) whether the merits of the Canases' claims entitle them to relief. We address these issues seriatim.

I

Both asylum and withholding of deportation relief are cut from the common cloth of persecution. Absent persecution, or fear of it, on account of an alien's race, religion, nationality, membership in a particular social group, or political opinion, an alien cannot qual-

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[9] This provides strong incentive for aliens to seek asylum relief in addition to withholding of deportation relief. *See Artiga Turcios v. I.N.S.*, 829 F.2d 720, 724 (9th Cir. 1987).

ify for either form of relief. Here, if application of the conscription policy to the Canases does not amount to persecution on account of one or more of the statutory grounds, then we need go no further.

The BIA determined that the Salvadoran conscription policy cannot constitute persecution because it applies equally to all Salvadorans without regard to race, religion, nationality, membership in a particular social group or political opinion. We disagree.

Conscription & Persecution

The BIA gave great weight to the facially neutral characteristics of the Salvadoran conscription policy.[10] Because nearly all conscription policies will appear facially neutral, the BIA's reasoning effectively means that no such policy can ever result in persecution within the meaning of the INA. Such a result ignores an elementary tenet of the United States constitutional law, namely, that a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons.[11] This tenet

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[10] At page 12 of its opinion, the BIA stated:

> [t]he respondents also do not claim that the Salvodoran [sic] . . . conscription laws are applied in a manner that discriminates based upon an individual's "race, religion, nationality, membership in a particular social group, or political opinion.[11]

Similarly, at page 15, the BIA stated:

> [A] reasonable person in the position of the respondents might fear persecution for a refusal to perform military service but would not believe that he had been punished on account of his religious beliefs where the same penalties are applied to all violators, regardless of the reasons for the refusal to serve.

[11] While we do not suggest that United States constitutional law is binding upon the Salvadoran government, we do be-

has been deemed particularly important where religion is concerned.[12]

For example, in *Wisconsin v. Yoder*, the Supreme Court wrote that "a regulation neutral upon its face may, in its application, nontheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." 406 U.S. 205, 220 (1972). Similarly, the Supreme Court has exempted personal choices born of religious motivations from otherwise valid and neutral state regulation. *E.g., Thomas v. Review Bd.*, 450 U.S. 707 (1981) (Jehovah's Witness entitled to employment benefits when he left job in weapons plant due to religious convictions); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Seventh Day Adventist whose religion prevented work on Saturday not barred from receiving employment benefits).

Applying the principle embodied in these cases, we conclude that the mere facial neutrality of the Salvadoran conscription policy does not preclude it from amounting to persecution under the INA. Whether persecution results in a given case depends on the circumstances and characteristics of the affected aliens. We next consider the circumstances and characteristics of the affected aliens in this case.

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lieve that United States jurisprudence is relevant to analysis of new issues of United States refugee law. Here we consider solely whether the Canases are entitled to relief afforded under United States refugee law.

[12] Although the principle also is at work in equal protection jurisprudence, those cases differ crucially from freedom of religion cases because the equal protection clause requires proof of discriminatory intent. *E.g., Village of Arlington Heights v. Metropolitan Housing Dev.*, 429 U.S. 252, 563-66 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976).

II

The Canases assert that application of the conscription policy to them results in persecution because of their religion's requirement of pacifism. They argue that the asylum and withholding of deportation provisions afford relief to aliens such as themselves whose genuine religious, moral or other genuine beliefs dictate that they be conscientious objectors to military service.

No specific provision is made for conscientious objectors within the INA or the UN Protocol with which the asylum and withholding provisions are meant to conform. The Canases, however, contend that conscientious objectors are nevertheless encompassed within the relief afforded by those provisions. They rely upon the UN Handbook to support their argument.

Although the BIA considered the relevant Handbook provisions, it dismissed them as ambiguous and not dispositive.[13] We disagree. The Handbook unambiguously supports the Canases' claims.

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[13] We note that the IJ declined to follow the UN Handbook because it had been published prior to the passage of the 1980 Refugee Act. The IJ's concern was unfounded, however, because Congress had knowledge of the standards contained in the UN Handbook at the time it passed the 1980 Refugee Act. *See M.A. A26851062 v. U.S. I.N.S.*, 858 F.2d 210, 214-15 n.3 (4th Cir. 1988). The Department of Justice, too, has noted the likelihood that Congress intended the standards within the UN Handbook to serve as an interpretive guide to the 1980 Refugee Act. *Id.* (citing U.S. Refugee Program: Oversight Hearings Before the Subcommittee on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 24, 26 (1981) (Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David Crossland, General Counsel, Immigration and Naturalization Service)).

Conscientious Objectors & Persecution

The Handbook is published by the Office of the United Nations High Commissioner for Refugees (UNHCR) for the purpose of providing guidance to governments about "procedures and criteria for determining refugee status." UN Handbook Preface at 1. Because the requirements for establishing refugee status, the prerequisite for gaining asylum relief, are identical to those for establishing entitlement to withholding of deportation,[14] the Handbook's instruction is useful in determining both asylum and withholding of deportation claims.

Both the Supreme Court and this court have looked to the Handbook for guidance in determining refugee status, and consider it to be authoritative on the subject. *E.g., Cardoza Fonseca*, 480 U.S. at 438-89 & n.22 (Handbook provides "significant guidance in construing Protocol"); *Artiga Turcios*, 821 F.2d at 1400 (using Handbook procedures in evaluating impact of alien's false statements upon refugee status); *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 517 (9th Cir. 1985) (Handbook's guidance in determining imputed political opinion); *McMullen v. I.N.S.*, 658 F.2d 1312, 1319 (9th Cir. 1981) (citing Handbook for proposition that refugees are limited in ability to present evidence of persecution). The BIA also looks to the Handbook for guidance. *E.g., Matter of Vigil*, Int. Dec. 3050 (BIA 1980); *Matter of A.G.*, Int. Dec. 3040 (BIA 1987); *Matter of Acosta*, Int. Det. 2986 (BIA 1985).

The relevant Handbook paragraphs appear under the heading of a section entitled "Deserters and persons avoiding military service," and include para-

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[14] *Compare* 8 U.S.C. § 1253(h) *with* 8 U.S.C. § 1101(a)(42).

graphs 167-174. When read in toto, this entire section emphasizes that refusal to perform military service on account of genuine reasons of conscience may be a basis for refugee status.[15]

For example, paragraph 172 reads:

> 172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by . . . his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any individual indications that the applicant or his family may have encountered difficulties due to their religious convictions.

The BIA apparently read the last sentence of paragraph 172 as a limitation upon the rest of the paragraph. It opined:

> The respondents did not make any showing that their family members had "encountered difficulties" in El Salvador because of their religious beliefs. Thus, the core of the respondent's argument is that they are "refugees" under the protocol because they are conscientious objectors who come from a nation with compulsory military service. We decline to construe the refugee definition contained in the protocol in such a broad manner, although the UNHCR has advised that its position is that persons such as the respond-

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[15] Only refusal based upon the mere dislike of military service or fear of combat is rejected as a basis for refugee status. *See* Handbook ¶ 168.

> ents "may be accorded refugee status" under the protocol.

BIA Opinion at 11 (footnotes omitted).

This construction of paragraph 172 imposes upon the Canases the burden of demonstrating previous difficulties due to their religious convictions before they can gain refugee status on the basis of religious persecution. Imposition of such a burden is illogical as it would preclude those persons experiencing first time religious persecution from gaining refugee status. A natural reading of the last sentence indicates that evidence of other difficulties stemming from religious persecution will buttress a claim but lack of such evidence does not bar it.

Even if this sentence is ambiguous, it should be construed liberally, not restrictively, in light of the body of the paragraph and other relevant sections. For example, paragraph 170 states that there are cases in which "the necessity to perform military service may be the sole ground for a claim to refugee status, i.e., when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience."

Nor do we find persuasive the BIA's conclusion that Handbook paragraph 173 mandates that this issue be left to the legislation of individual governments rather than being a question of legal rights under the Protocol.[16] Paragraph 173 simply suggests that the grant-

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[16] Paragraph 173 reads:

> The question as to whether objection to performing military service for reasons of conscience can give rise to a

ing of refugee status to conscientious objectors is all the more reasonable in light of the growing trend in international law of recognition of conscientious objector status. Thus, it too supports the Canases' claims.[17]

We conclude that the BIA erred as a matter of law in determining that conscientious objectors who face punishment as a result of their refusal to perform military service cannot demonstrate persecution within the meaning of the INA. A conscientious objector is one whose actions are governed by conscience, and persecution arises whenever that conscience is overcome by force or punishment meted out for the refusal to betray it. We hold that punishment of a conscientious objector for refusal to comply with a policy of mandatory conscription may amount to persecution within the meaning of the INA, if the refusal is based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience.

> valid claim to refugee status should also be considered in light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In the light of these developments, it would be open to the Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

(footnote omitted).

[17] The Canases also correctly point out that paragraph 173 has never before posed an obstacle to the BIA's application of Handbook provisions to refugee claims by draft resisters.

III

The Canases contend the BIA applied an incorrect standard in assessing their claims when it required the Canases to demonstrate motive or intent to persecute on the part of the Salvadoran government. We agree.

Intent & Motive to Persecute

We have stated previously that a showing of well-founded fear requires examination of both the asylum seeker's subjective fear of persecution as well as an examination of the objective nature of the articulated reason underlying the fear. *Rodriguez-Rivera*, 848 F.2d at 1001. In short, the subjective component requires the alien's fear to be genuine while the objective component requires that the fear be reasonable. *Id.* at 1003.

The BIA has utilized a similar standard, stating that a well-founded fear of persecution is established when an applicant "show[s] that a reasonable person in his circumstances would fear persecution." *Matter of Mogharrabi*, Int. Dec. 3028 at 9 (BIA 1987).[18]

Neither of these standards requires an asylum applicant to establish the persecutor's intent or motive. Intent or motive to persecute is merely one relevant consideration in the analysis of an asylum claim. *E.g.*, *Lanzo-Majono v. I.N.S.*, 813 F.2d at 1435; *Hernandez-Ortiz*, 777 F.2d at 516. Here, however, the BIA transformed these relevant factors into requirements.[19]

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[18] We express no opinion about whether the BIA's "reasonable person" standard is consistent with our two-part test articulated in *Rodriguez-Rivera*, 848 F.2d at 1001. That issue is not before us.

[19] The BIA's opinion primarily addressed whether the Canases met the "well-founded fear" standard for establish-

For example, on page 14 of its opinion, the BIA says:

> [A]lthough the respondents may view any penalty that they receive for their refusal to serve as punishment for their religious beliefs, we do not consider that punishment to constitute persecution, within the meaning of the Refugee Act and cases interpreting that Act, in *the absence of a showing that the government's motivation for imposing the punishment stems from the respondent's religious beliefs*. . . .

(Emphasis added.)

On page 15, it states:

> Since *respondents have not shown that the Salvadoran government is inclined to persecute* Jehovah's Witnesses or that the government is aware of the respondent's religious beliefs, the government would presumably punish the respondents just as it would punish any other Salvadoran who refused to comply with the conscription process. . . .

(emphasis added).

The last sentence of the same paragraph reads:

> In this regard, the *respondents have not demonstrated* that the Salvadoran government would

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ing an asylum claim and did not devote separate consideration to the withholding of deportation claim. This approach was appropriate because if a petitioner cannot satisfy the easier fell-founded fear standard, then he certainly cannot satisfy the more difficult clear probability of persecution standard required for withholding of deportation. *Diaz-Escobar v. I.N.S.*, 782 F.2d 1488, 1491 (9th Cir. 1986).

> regard the fact that the respondents have religious reasons for their refusal to serve in the military as anything but a matter of conscience [sic—should read "coincidence"; see p. 48a, *infra*].

(Emphasis added.)

These excerpts indicate that the BIA required the Canases to demonstrate intent or motive to persecute on the part of the Salvadoran government. No good reason exists to impose such a requirement upon refugee claimants. Bona fide refugees already face logistical problems in gathering evidence due to their being outside of the country where the alleged persecution occurred. *See Bolanos-Hernandez v. I.N.S.*, 749 F.2d 1316, 1325 (9th Cir. 1984) ("authentic refugees rarely are able to offer direct corroboration of specific threats.").[20] Evidence of proof of intent and motive would be particularly hard to provide because both involve proof of a persecutor's state of mind. We have said that "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." *Id.* at 1325.

The BIA's requirement that the Canases demonstrate proof or motive to persecute was an erroneous and unsupported departure from precedent and is reversible error.[21]

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[20] Similarly, the UN Handbook suggests that the "requirement of evidence should not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself." Handbook ¶ 197; *accord* ¶ 196 (applicant statements should be given benefit of doubt as to credibility because of difficulty of corroboration).

[21] We note that in footnote 11 of its opinion, the BIA states that "[a]sylum applicants need not prove a government's

IV

Having corrected the BIA's legal errors, we could now remand for application of the identified legal standards. Remand in this case, however, would serve no purpose because the facts are undisputed. *See Maldonado-Cruz v. Dep't. of Immigration & Naturalization*, 883 F.2d 788, 192 n.7 (9th Cir. 1989).

Merits

In our concern for efficiency, we consider first the Canases' claims under the more stringent clear probability of persecution standard required for withholding of deportation. If this more difficult standard can be met, then the more generous well-founded fear standard required for asylum will be met a fortiori. *Bolanos-Hernandez*, 749 F.2d at 1322.

A. Religious Persecution

The record reveals that both the IJ and BIA determined that the Canases had genuine religious convictions which prevent them from performing military service. The record also reveals that the Salvadoran conscription policy allows no exemption for religious reasons and refusal to serve results in punishment by imprisonment. Under the Salvadoran conscription policy, if the Canases refuse to do military service then they will go to prison. Any reasonable person in this position would conclude that the punishment would be on account of his religious beliefs.

The result is that if the Canases follow their religious beliefs and refuse to do military service, they

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'subjective' intent to persecute . . . Reasonable inferences can be drawn from governmental or individual actions." Although this is a correct statement of the law, we find it at odds with the text of the opinion.

will suffer imprisonment. This adds up to a clear probability of persecution on account of religious beliefs because it is "more likely than not," *Stevic*, 467 U.S. at 414; *Blanco-Lopez*, 858 F.2d at 533, that the Canases will suffer imprisonment due to their religious convictions. *See* Handbook ¶¶ 167-174.

B. Persecution on Account of Imputed Political Opinion

The Canases also assert that their refusal to perform military service will be viewed as political opposition to the government. They argue that, as possessors of an imputed political opinion that is opposed to the government, they will be exposed to extra-judicial sanctions including torture and death.

In rejecting their claim of persecution on account of imputed political opinion, the BIA relied upon its earlier decision in *Matter of A-G*, Int. Dec. 3040 (BIA 1987), and said:

> We rejected a similar argument in *Matter of A-G*. In that case we found that a Salvadoran who claimed that he would be tortured or killed by "death squads" if returned . . . had not established that "mere failure to serve in the military is the kind of activity which draws the attention of the persons who carry out these killings."

BIA Opinion at 17 (citations and footnote omitted).

The BIA's reliance upon *Matter of A-G* is misplaced. First, the Canases are entitled to a determination of the probability of persecution of themselves, not of others. *Kovacs v. I.N.S.*, 407 F.2d 102, 105 (9th Cir. 1969). The BIA merely summarized, in a footnote, the evidence offered by petitioners. BIA

Opinion at 16 n.3. It drew no conclusions from the evidence and attempted no analysis.[22]

Second, *Matter of A-G* is distinguishable. That alien presented no evidence linking a failure to serve in the military with torture or death. *Matter of A-G*, Int. Dec. 3040 at 7. Instead, he presented only general evidence of torture and executions carried out by Salvadoran "death squads." *Id.* Here, nearly all of the Canasas' evidence relates directly to the consequences either of refusal to do military service or of a perceived refusal to do it.

Nor did the alien in *Matter of A-G* present evidence or argue that this punishment for refusing to serve in the military constituted religious persecution. Indeed, the BIA specifically noted that although it is generally true that a requirement of military service is not persecution, an exception exists in:

> those rare cases where a disproportionately severe punishment would result on account of one of the five grounds enumerated in . . . the Act . . . .

Id. at 6.

This is one of those rare cases. A Salvadoran who prefers not to serve in the military for reasons not amounting to genuine reasons of conscience (for example, fear of combat) does not suffer disproportionately greater punishment when his will is overcome by being forcibly conscripted. By comparison, however, the Canases suffer disproportionately severe punishment when forced to serve in the military be-

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[22] At oral argument, counsel for the government argued that the BIA was entitled to take judicial notice of the facts in *Matter of A-G*. This argument is nonsensical and we reject it.

cause that service would cause them to sacrifice their religion's fundamental principle of pacifism.

The Canases' refusal to do military service because of their religious beliefs also necessarily places them in a position of political neutrality in the Salvadoran civil conflict.[23] *Bolanos-Hernandez*, 749 F.2d at 1324-25. An expression of political neutrality is no less an expression of political opinion than is the decision to affiliate with an organized political faction. *Vides-Vides v. I.N.S.*, 783 F.2d 1463, 1466-67 n.2 (9th Cir. 1986) (desire to join neither side was "political opinion"). "Just as a nation's decision to remain neutral is a political one, so is an individual's." *Bolanos-Hernandez*, 749 F.2d at 1324-25 (citing Neutrality Act of 1939, 22 U.S.C. §§ 441-465 (1982)).

Because the Canases clearly have adopted a stance of political neutrality, it remains only for us to determine whether the evidence presented indicates that such a stance results in a clear probability of persecution. We conclude that it does.

The Canases presented voluminous and convincing evidence that persons who refuse to comply with the Salvadoran conscription policy are exposed to severe dangers, including torture and death. The specifics were set forth earlier, *see* supra pp. 3-4, and need not be repeated. This evidence demonstrates a clear probability of persecution on account of imputed political opinion because the Canases' refusal to serve in the military will "more likely than not" subject

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[23] We are also influenced by the UNHCR's argument that a refusal to bear arms is a uniquely political statement. UNHCR Brief at 31-36. Such a perspective naturally requires the viewing of any conscientious objection to military service as an inherently political opinion. *Accord Bolanos-Hernandez*, 749 F.2d at 1324-25; *Vides-Vides*, 783 F.2d at 1466-67 n.2.

them to extrajudicial sanctions. *Stevic*, 467 U.S. at 414; *Blanco-Lopez*, 858 F.2d at 533.

CONCLUSION

We hold on the record established that the Canases qualify for asylum and withholding of deportation relief because their refusal to serve in the military is based on genuine reasons of conscience and because such refusal will more likely than not subject them to imprisonment, and possibly torture and death on account of their religious beliefs and imputed political opinion. We base this holding in large part upon relevant provisions of the UN Handbook that urge the granting of refugee status to conscientious objectors when their country's conscription policy allows no exemptions or alternatives to military service and when the refusal to perform military service is based upon genuine reasons of conscience.

We REVERSE the BIA's denial of asylum and withholding of deportation relief and instruct that withholding of deportation relief be granted. We REMAND the case to the BIA to exercise its discretion with respect to the asylum relief.

LEAVY, Circuit Judge, special concurrence:

I concur in Part IV.B of the opinion which holds that the Canases are qualified for withholding of deportation and refugee status based on an "imputed" political opinion. We have held that persecution "on account of" political opinion includes persecution not only on account of political opinions that the petitioner actually holds, but also on account of opinions that the persecutor falsely attributes to the petitioner. *See Rivas v. INS*, No. 88-7463, slip op. 3157, 3164 (9th Cir. March 29, 1990); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516-17 (9th Cir. 1985).

I cannot agree with the majority's analysis of religious persecution, however, because it treats as irrelevant the motive of the persecutor. Rather than stating that the persecutor's motive in persecuting is insignificant, the cases cited by the majority support the opposite proposition. *See Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (petitioner persecuted "for her political opinion"); *Hernandez-Ortiz*, 777 F.2d at 516 ("persecution" is oppression inflicted on individuals "because of a difference that the persecutor will not tolerate"). The majority's conclusion also conflicts with the statutory "on account of" language, which clearly refers to the underlying motives or reasons behind the persecution. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1253(h)(1).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-7444

INS Nos. A26-790-253, A26-790-255

JOSE ROBERTO CANAS-SEGOVIA;
OSCAR IBAN CANAS-SEGOVIA, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

ORDER

[Filed Oct. 9, 1990]

Before: WRIGHT, HUG and LEAVY, Circuit Judges.

The panel has voted to deny respondent's petition for rehearing.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The en banc request failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

Date: Sep. 13, 1988

File: A26 790 253—San Francisco
A26 790 255

IN RE: JOSE CANAS-SEGOVIA
OSCAR CANAS-SEGOVIA

IN DEPORTATION PROCEEDINGS APPEAL

On Behalf of Respondents:

Karen Musalo, Esquire
Father Moriarity Central
American Refugee Program
180 Fair Oaks Street
San Francisco, California 94110

On Behalf of Service:

David Dixon
Appellate Counsel

ORAL ARGUMENT:

February 23, 1988

CHARGE:

Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)]—Entered without inspection (both respondents)

APPLICATION: Asylum; withholding of deportation

DECISION OF THE BOARD OF IMMIGRATION APPEALS

This is an appeal from the decision, dated February 4, 1986, in which the immigration judge denied the respondents' requests for relief pursuant to sections 208(a) and 243(h) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. §§ 1158(a) and 1253(h), respectively, but granted the respondents the privilege of voluntary departure in lieu of deportation. The respondents' appeal will be dismissed.

The respondents are natives and citizens of El Salvador; they are brothers. Respondent Jose Canas-Segovia ("Jose Canas") is 18 years old. Respondent Oscar Canas-Segovia ("Oscar Canas") is 20 years old. The respondents entered the United States without inspection on January 27, 1985. On the following day, the Immigration and Naturalization Service ("Service") issued Orders to Show Cause (Form (Form I-221S) against the respondents, charging that the respondents were deportable pursuant to section 241(a)(2) of the Act because they had entered this country without inspection. At their deportation hearings on April 11, 1985, the respondents conceded that they were deportable as charged in the Orders to Show Cause (Tr. at 3, 7). We therefore find that the respondents' deportability has been established by clear, convincing, and unequivocal evidence as required by *Woodby* v. *INS*, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14(a). On December 16, 1985, the respondents' motion to have their deportation hearings consolidated was granted by the immigration judge (Tr. at 9).

The respondents submitted written applications for asylum (Form I-589).[1] In their applications, the respondents stated primarily that they belong to the Jehovah's Witnesses religion, which forbids its members from performing military service, and that they fled El Salvador before the government there could conscript them for military service. Pursuant to regulation, the respondents' applications were referred to the Department of State Bureau of Human Rights and Humanitarian Affairs ("BHRHA") for advisory opinions. 8 C.F.R. § 208.10(b). The BHRHA issued brief advisory opinions concerning the respondents' applications in which it concluded that the respondents had "failed to establish a well-founded fear of persecution upon return to El Salvador within the meaning of the United Nations Convention and Protocol Relating to the Status of Refugees" (Exhs. 4, 4A).

After a hearing on the merits of the respondents' applications, the immigration judge concluded that the respondents had not demonstrated eligibility for asylum and withholding of deportation. The immigration judge found that the respondents were credible witnesses and that their religious convictions were bona fide. The immigration judge concluded, however, that because there was no evidence in the record that the Salvadoran government persecutes Jehovah's Witnesses on account of their religion or for any other reason, the government's policy of requiring military service of all its citizens, without allowing exceptions for conscientious objectors, did

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[1] Pursuant to 8 C.F.R. § 208.3(b), a request for asylum is also regarded as a request for withholding of deportation under the Act.

not constitute "persecution" within the meaning of the Act.

On appeal, the respondents argue that the immigration judge failed to apply the proper standards to their asylum and withholding of deportation applications. They argue further, relying on the Office of the United Nations High Commissioner for Refugees, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979) ("*Handbook*"), that conscientious objection to military service that is based on religious beliefs is a valid basis for obtaining refugee status under the Act. Alternatively, the respondents argue that because of their refusal to perform military service in El Salvador, the government will now view them as "subversives" and subject them to "extra-judicial sanctions." For these reasons the respondents contend that the immigration judge's decision should be reversed and that their asylum and withholding of deportation applications should be granted.

In *INS* v. *Stevic*, 467 U.S. 407 (1984), the Supreme Court held that an alien establishes eligibility for withholding of deportation under section 243(h) of the Act if he can demonstrate a "clear probability of persecution" on account of his "race, religion, nationality, membership in a particular social group, or political opinion," if he were returned to a designated country. In *INS* v. *Cardoza-Fonesca*, —— U.S. ——, 107 S. Ct. 1207 (1987), which was decided subsequent to the immigration judge's decision in this case, the Court did not specify the standard governing asylum applications under section 208(a) of the Act, but did conclude that there is a significant difference

between the asylum and withholding of deportation standards for relief and that an alien need not show a "clear probability of persecution" in order to be eligible for asylum.[2]

In *Matter of Mogharrabi*, Interim Decision 3028 (BIA 1987), after reviewing decisions of the United States courts of appeals involving the asylum standard, this Board adopted the "reasonable person" test for the adjudication of asylum cases. We stated that an alien demonstrates eligibility for asylum "if he shows that a reasonable person in his circumstances would fear persecution [on account of one of the five grounds enumerated in section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A)]."[3] *Id* at 9.

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[2] The Refugee Act of 1980 revised section 243(h) of the Act and added section 208(a) to the Act. *See*, respectively, sections 203(e) and 201(b) of the Refugee Act of 1980, enacted March 17, 1980, P.L. 96-212, 94 Stat. 107, 103. The Refugee Act also added a definition of "refugee" to the Act. *See* section 201(a) of the Refugee Act, 94 Stat. 102. A "refugee" is now defined in section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A), as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

[3] The respondents argue initially in their brief that the immigration judge did not apply the proper standards to their asylum and withholding of deportation applications. As noted above, the immigration judge entered his decision in this case prior to the Supreme Court's *INS* v. *Cardoza-Fonseca* decision. Therefore, on appeal, we will apply the "clear proba-

The respondents here gave the following testimony in support of their asylum and withholding of deportation applications. Respondent Jose Canas testified that he began attending Jehovah's Witnesses services at a "Kingdom Hall" in El Salvador when he was 8 years old; he added that he began to study the religion earnestly at age 13 (Tr. at 20). Although he had not been baptized as a Jehovah's Witness at the time of his deportation hearing, Jose Canas explained that one must study the Bible in great detail in preparation for baptism into the Jehovah's Witnesses faith (Tr. at 22). Jose Canas testified that he had been attending a Kingdom Hall in San Francisco since he had been in this country, and that he did intend to become baptized as a Jehovah's Witness (Tr. at 21-22).

Respondent Jose Canas gave detailed testimony concerning the tenets of the Jehovah's Witnesses religion (Tr. at 21-27). He emphasized in his testimony that his religion forbade him from serving in the military under any circumstances (Tr. at 17, 27, 37). He also stated that his grandmother, his cousin, several of his aunts, and overall, "the majority" of his family members were Jehovah's Witnesses (Tr. at 19-20).

Respondent Jose Canas testified further that on one occasion when he was in El Slavador, he saw the military forcibly conscript a group of underaged males who lived in his neighborhood (Tr. at 27-29). He stated that after he witnessed this incident, he was afraid to go out of his house for fear that he too would be conscripted against his will (Tr. at 29). The respondent also stated that he refrained from

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bility" standard to the respondents' withholding of deportation applications and the less-demanding "well-founded fear" standard to their asylum applications.

going out with his friends, or from going to places where a group of young men could be found, because of his fear of forcible conscription (Tr. at 32).

Respondent Jose Canas testified that he became even more afraid of being conscripted by the military after he learned that the government was planning to implement a new conscription policy (Tr. at 31). According to the respondent, the government planned to send draft notices to all 18-year-olds in El Salvador, and if the draftee did not respond after having received three notices, then the government planned to go to the home of the draftee and force him to join the military (Tr. at 31). The respondent stated that he left El Salvador 1 year after he learned of the new conscription policy; he was 15 years old when he left El Salvador (Tr. at 33, 49).

The respondent testified that the reason he left El Salvador was that he was afraid that he would be forced to join either the Salvadoran army or the Salvadoran guerrillas, and he could not fight with either side because of his religious beliefs (Tr. at 16-17, 38-39). The respondent stated that neither the guerrillas nor the army approached him and asked him to join them, and he did not receive a draft notice prior to his departure from El Salvador (Tr. at 43). The respondent also stated that he did not know whether the guerrillas or the army were aware that he was studying the Jehovah's Witnesses faith, but he did testify that neither group had come to the Kingdom Hall when the respondent was worshiping there (Tr. at 52-53). Finally, respondent Jose Canas testified that members of a guerrilla group known as the "Popular Revolutionary Block" ("BPR") came to his school and asked some of the students to distribute leaflets and pamphlets; the respondent stated that the

group members were not interested in him because he was too young, and he stated further that they did not ask him to do anything on their behalf (Tr. at 51-52).

Respondent Oscar Canas' testimony was similar to that of his brother Jose. Oscar Canas testified that he too had attended a "Kingdom Hall" in El Salvador since he was 8 years old (Tr. at 55). He testified that he had not been baptized as a Jehovah's Witness, but that he was studying the religion in order to become baptized (Tr. at 59-61). Respondent Oscar Canas testified that fifteen of his relatives were either officially recognized as Jehovah's Witnesses or were studying to become Jehovah's Witnesses (Tr. at 57).

Respondent Oscar Canas also testified in detail about the tenets of the Jehovah's Witnesses religion (Tr. at 78-83). He stated that he could not serve in the military because of his religious beliefs and that he would not render any service that was related to the furtherance of a war effort (Tr. at 82-83). He also stated that he could not fight along with the Salvadoran guerrillas because of his religious principles (Tr. at 54-55).

Oscar Canas stated that his family lived in an area in El Salvador where there were often battles between the guerrillas and the Salvadoran army (Tr. at 66). The respondent stated that in 1981 and 1982, there were several battles in which the respondent heard gunfirse so close to his house that he threw himself on the floor inside the house (Tr. at 69). The respondent also stated that he remained in his house while these battles occurred and that none of the combatants approached him during the battles (Tr. at 88).

Respondent Oscar Canas testified that he had also witnessed an incident in which members of the Salvadoran army forcibly conscripted underaged males. The respondent stated that he and his friends were playing basketball when some soldiers arrived in a yellow pick-up truck (Tr. at 70). The respondent stated further that he and his friends immediately left the area, but that as they looked back they saw soldiers taking away some of the young men that had remained behind (Tr. at 70). The respondent also testified that the legal age for conscription in El Salvador was 18, but that the army would take youths who appeared capable of serving in the military regardless of their age (Tr. at 72-73).

Like his brother Jose, Oscar Canas testified that he stayed indoors after he had seen the soldiers forcibly conscripting other young males (Tr. at 73-74). When he learned of the government's new conscription policy, the respondent testified that he feared he would no longer be able to avoid conscription by simply remaining at home (Tr. at 76). He testified that he too left El Salvador because he was afraid that he would be forced to join either the army or the guerrillas (Tr. at 54). When asked by counsel as to how he believed officials of the Salvadoran army would respond if he told them that he could not serve in the military because of his religious beliefs, the respondent stated "I don't think they would care about what my religious beliefs were. What they care about is [whether] they can pick up people for fighting" (Tr. at 82). Oscar Canas stated further that he left El Salvador with his brother before the government's new conscription policy went into effect, that he was 16 years old when he left El Salvador, and that the

army did not order him to report for military service before he left there (Tr. at 88-90).

Respondent Oscar Canas also testified that in 1980 or 1981, members of a guerrilla group known as the "BPR" came to his school and asked all the students to join their cause and "to go out and distribute leaflets" (Tr. at 76-77). The respondent stated that the guerrillas did not threaten the students directly, but told the students that "something bad" would happen to those who did not cooperate (Tr. at 73). The respondent also stated that he stopped attending the school for "half a year" because he was afraid of what the guerrillas might do to him if he refused to aid them (Tr. at 78). The respondent later testified that the guerrillas had asked all the students at his school to distribute leaflets, but that the guerrillas did not return with materials for the students to distribute; and he did not have any further contact with the guerrillas after he left the school (Tr. at 89). The respondent also testified that he did not tell the guerrillas, nor did it become known to them, that he was studying the Jehovah's Witnesses religion (Tr. at 89-90).

The respondents have submitted documents and affidavits into the record in support of their asylum applications. Among the documents included in the record is a United Nations report on conscientious objection to military service (Exh. 7). This report indicates that according to Salvadoran law, all males between the ages of 18 and 30 are required to perform military service—exceptions are permitted only for health and family reasons (Exh. 7 at 20-21, 31). The report also indicates that the Salvadoran government does not allow for exemptions from military service for conscientious objectors (Exh. 7 at 23).

Furthermore, the report provides that conscientious objectors in El Salvador may be imprisoned and punished as deserters (Exh. 7 at 28). The evidence in the record also indicates that Jehovah's Witnesses are categorically opposed to participation in war and service in the military (Exh. 5).

The Service has not filed a brief on appeal in this case. At oral argument, however, the Service stated that its present position is that an alien who belongs to a "sect" such as the Jehovah's Witnesses, which historically has opposed all wars, and who comes from a country which does not allow exemptions from military service for conscientious objectors, should be eligible for asylum in the United States.[4] The Service requested, however, that the record be remanded in this case so that the immigration judge could further inquire into the genuineness of the respondents' religious convictions. Based upon our review of the record, we find that the respondents came forward with sufficient testimony to demonstrate that their religious convictions are genuine. Accordingly, we will proceed to a consideration of the respondents' arguments on appeal with the assumption that the respondents possess the religious beliefs of bona fide Jehovah's Witnesses.

The respondents' chief contention on appeal is that, pursuant to the guidelines set forth in the UNHCR *Handbook*, they have demonstrated eligibility for asylum under the 1980 Refugee Act. Congress enacted the Refugee Act in part to make the domestic refugee laws conform to the 1967 United Nations Protocol Relating to the Status of Refugees ("Proto-

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[4] The Service did not offer any authority at oral argument in support of this position.

col"), to which the United States had acceded in 1968. See *INS* v. *Cardoza-Fonseca*, *supra*, at 1216; *INS* v. *Stevic*, *supra*, at 426-27. The Supreme Court stated in *INS* v. *Cardoza-Fonesca*, *supra*, at 1217 n.22, that the *Handbook* provides "significant guidance" with respect to interpretation of the Protocol. The Court also stated, in the context of its decision concerning the evidentiary standard in asylum cases, that:

> We do not suggest . . . that the explanation in the U.N. Handbook has the force of law or in any way binds the INS with reference to the asylum provisions of § 208(a). Indeed, the Handbook itself disclaims such force, explaining that "the determination of refugee status under the 1951 Convention and the 1967 Protocol . . . is incumbent upon the Contracting State in whose territory the refugee finds himself."

Id.; see also Matter of Acosta, Interim Decision 2986, at 13 (BIA 1985) (modified on other grounds in *Matter of Mogharrabi*, *supra*, at 11).

In the brief in support of their appeal, the respondents have cited paragraphs 170 and 172 of the *Handbook* to support their argument that they qualify for asylum. These paragraphs provide as follows:

> 170. There are . . . cases where the necessity to perform military service may be the sole ground for a claim of refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

> 172. Refusal to perform military service may . . . be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

Handbook at 40.

In addition, the respondents submitted into evidence a letter, dated January 30, 1986, from Joachim Henkel, a UNHCR Deputy Representative, addressed to the respondents' counsel (Exh. 8). In the letter, Mr. Henkel writes:

> Paragraph 170 of the Handbook addresses the situation of a person whose sole basis for a claim to refugee status is that the performance of military service would have required his participation in military action "contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience." State practice on this issue is not uniform. UNHCR takes the view, however, that, especially where no alternative to military service exists, significant punishment for refusal to perform military service, based on strong religious or moral convictions, or on political opinion, may be considered persecution. Therefore, assuming that the religious, moral or political conviction advanced is reasonably credible, and surrounding circumstances of the case do not argue otherwise, a draft evader

> or deserter of that description may be accorded refugee status even though the punishment he faces does not differ substantially from that meted out generally for this offense because of a simple disinclination to serve.

Thus, the respondents argue that the performance of military service in El Salvador would be contrary to their religious convictions, and that any punishment which they would receive while adhering to their convictions would amount to religious persecution.

We began our analysis by emphasizing that there is no provision in the Protocol which declares that conscientious objectors from nations with compulsory military service are *per se* refugees, nor is there any indication of a consensus among the signatories to the Protocol that persons similarly situated to the respondents qualify as refugees under the terms of the Protocol. To the contrary, the above-cited letter written by a UNHCR Deputy Representative indicates that "State practice on this issue is not uniform." [5]

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[5] The U.N. report on conscientious objection that the respondents submitted into evidence reflects that on December 4, 1981, the U.N. Secretary-General addressed a request for comments concerning conscientious objection to military service to various governmental and nongovernmental organizations (Exh. 7 at 31). The majority of the 11 governments that responded to this request for information took the position that while persons who objected to military service for reasons of conscience could apply for asylum, their applications would be considered on a case-by-case basis (Exh. 7 at 31-32). The UNHCR, which also responded to the Secretary-General's request, stated in its reply, dated February 15, 1982, that:

> Conscientious objectors may . . . be considered as refugees and be granted asylum if they fulfill the normal criteria of refugee status, i.e. if they have a well-founded fear of

The respondents have relied on the *Handbook* as the basis for their asylum requests, but the *Handbook* paragraphs cited by the respondents do not have the "force of law" and, in our view, are not dispositive of the issue in this case. *Handbook* pargaraphs 170 and 172 do suggest that a refusal to perform military service which is grounded in religious belief may be a basis for obtaining refugee status. Paragraph 172 adds that "[s]uch a claim would . . . be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions." The respondents did not make any showing that their family members had "encountered difficulties" in El Salvador because of their religious beliefs. Thus, the core of the respondents' argument is that they are "refugees" under the Protocol because they are conscientious objectors who come from a nation with

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> persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. In applying these criteria to conscientious objectors, it should be borne in mind that fear of prosecution or punishment for objection to military service, desertion or draft evasion, is not a reason for granting refugee status unless there are also elements indicating a well-founded fear of persecution under the refugee definition. Whether such elements exist must of course be determined according to the circumstances of the particular case.

(Exh. 7 at 32). Thus, although the record reflects in this case that the UNHCR apparently no longer subscribes to this view, the UNHCR previously indicated, in its written response to the Secretary-General's inquiry, that a conscientious objector would not qualify as a refugee if he demonstrated only that he feared prosecution for his objection to military service.

compulsory military service.[6] We decline to construe the refugee definition contained in the Protocol in such a broad manner, although the UNHCR has advised that its position is that persons such as the respondents "may be accorded refugee status" under the Protocol.

The *Handbook* itself suggests that the issue of extending protection to conscientious objectors is a matter of state prerogative rather than legal right under the Protocol. Paragraph 173 of the *Handbook*, which respondents have not cited in their brief, provides:

> The question as to whether objection to performing military service for reasons of conscience can give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies. In the light of these developments, *it would be open to Contracting States*, to grant refugee status to persons who object to performing military service for genuine reasons of conscience [emphasis added].

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[6] According to the U.N. report in the record, which was prepared in 1983, 40 countries had conscription without providing any alternative to military service (Exh. 7 at 30).

Handbook at 40-41. This passage provides that nations may wish to extend protection to aliens consistent with developments in domestic laws, and it also suggests that the decision concerning whether to offer such protection would be a policy matter separate from the traditional issue of whether an alien is a victim of "persecution" under the Protocol. The question of whether these respondents should be offered protection as a matter of policy, and for reasons separate from the interpretation of the Protocol and the Refugee Act, will be discussed below. Neither the explicit terms of the Protocol nor the practice of signatories to the Protocol, however, resolves the issue of whether the respondents here are "refugees." The *Handbook* is not controlling authority with respect to this issue and, in this instance, the guidance set forth in the *Handbook* is not free from ambiguity. We will therefore turn to a consideration of whether the respondents are "refugees" under this nation's asylum laws.

The issue before this Board, then, is whether aliens who refuse to perform military service in their native country for genuine religious reasons, and who would be subject to prosecution for that refusal, qualify as "refugees" within the meaning of the Refugee Act.[7] The respondents urge that they do qual-

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[7] The respondents presented evidence and gave testimony concerning the Salvadoran army's forcible conscription of youths who had not yet reached the age of 18. The respondents are now over 18 years old and would be subject to lawful conscription in El Salvador. The respondents testified that the government's intention to mail draft notices to 18-year-olds, which in itself is certainly a lawful process, was what prompted them to leave El Salvador. The issue of whether the Salvadoran government's forcible and extralegal conscription of underaged males constitutes "persecu-

ify as "refugees," although they have not shown, and apparently do not claim, that the Salvadoran government has the inclination to persecute Jehovah's Witnesses for any reason unrelated to the respondents' argument concerning conscription; the respondents also do not claim that the Salvadoran government has enacted its conscription laws with a persecutory intent, or that the conscription laws are applied in a manner that discriminates based on an individual's "race, religion, nationality, membership in a particular social group, or political opinion."

As the United States Court of Appeals for the Ninth Circuit has stated, the motivation of an alleged persecutor is a relevant and proper consideration when analyzing an alien's eligibility for asylum. *See Lazo-Majano* v. *INS*, 813 F.2d 1432, 1435 (9th Cir. 1987); *Zayas-Marini* v. *INS*, 785 F.2d 801, 806 (9th Cir. 1986); *Hernandez-Ortiz* v. *INS*, 777 F.2d 509, 516 (9th Cir. 1985); *see also Matter of Maldonado*, Interim Decision 3041, at 6-7 (BIA 1988). An examination of the motivation of the alleged persecutor in this case, the Salvadoran government, reveals that the government has not "singled out" the respondents for persecution because of their religious beliefs. The Salvadoran government has been involved in an ongoing struggle in which it has sought to overcome the armed resistance in El-Salvador. As a means to this end, the Salvadoran government has required that all

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tion" is not presented by this appeal. We note, though, that the evidence in this case indicates that both the Salvadoran army and the guerrillas have engaged in the indiscriminate, forcible recruitment of young males in El Salvador. Because of its indiscriminate nature, this forcible recruitment would appear to be a risk inherent in a civil war, rather than a risk of "persecution." *See Campos-Guardado* v. *INS*, 809 F.2d 285, 290 (5th Cir. 1987).

males between the ages of 18 and 30 perform military service. The Salvadoran government has not allowed for exemptions from military service for conscientious objectors. This is most likely because the government has determined that it needs as many able-bodied men as possible to pursue its military objectives. But there is nothing in this record which indicates that the Salvadoran conscription law does not offer exceptions from mandatory service to conscientious objectors because the intent of the law is to persecute Jehovah's Witnesses, or members of any other religious group which is opposed to military service and war.[8] Nor is there evidence that the conscription laws were enacted or are applied in a discriminatory manner; (e.g., with only those with religious objections being punished for their refusal to join the military). *See Handbook* paragraph 59.

The respondents argue that from their perspective, the Salvadoran government's actions are tantamount to religious persecution, because they would be punished for a refusal to perform military service that was based on religious convictions.[9] This argument

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[8] Although the Service stated its view at oral argument that an alien would be eligible for asylum if he could show that he belonged to a "sect" such as the Jehovah's Witnesses which opposes all wars, and that he comes from a country which requires military service from all its male citizens, we do not agree that such an alien qualifies as a "refugee," as defined in section 101(a)(42)(A) of the Act, absent some indication that his government is inclined to persecute members of his religious group.

[9] In support of this position, the respondents have cited a 1962 decision of the West German Federal Administrative Court, in which that court stated:

> a conscientious objector on grounds of religion is involved in a conflict between two duties. On one hand, the State

ignores the well-settled requirement in cases involving interpretation of the Refugee Act that there must be an objective basis to an alien's fear before that fear will be considered "well-founded." *See, e.g., Diaz-Escobar* v. *INS*, 782 F.2d 1488, 1492 (9th Cir. 1986); *Cardoza-Fonseca* v. *INS*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, *INS* v. *Cardoza-Fonseca*, *supra*; *Carvajal-Munoz* v. *INS*, 743 F.2d 562, 574 (7th Cir. 1984); *Matter of Mogharrabi*, *supra*, at 8. That is, a reasonable person in the position of the respondents might fear prosecution for a refusal to perform military service, but would not believe that he had been punished on account of his religious beliefs where the same penalties are applied to all violators, regardless of the reasons for the refusal to serve. Respondent Oscar Canas himself testified that he did not think the Salvadoran military would care about his religious beliefs and stated that what they did care about was "pick[ing] up people for fighting." Although the respondents may view any penalty that they receive for their refusal to serve as punishment for their religious beliefs, we do not consider that punishment to constitute persecution, within the meaning of the Refugee Act and cases interpreting that Act,[10] in the absence of a showing

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requires him to perform military service; on the other hand his religion requires him to refrain from such service for reasons of conscience. If the State takes action against the person involved in such a conflict, the effect as far as he is concerned is persecution because of his religion.

See attachment to Exhibit 8.

[10] In their brief, the respondents cite *Sarkis* v. *Sava*, 599 F.Supp. 724 (E.D.N.Y. 1984), in support of their contention that an alien can demonstrate eligibility for asylum by show-

that the government's motivation for imposing the punishment stems from the respondents' religious beliefs, or that the government's conscription laws are carried out in a manner which punishes a person because of his particular religious beliefs or his religious affiliation.[11]

Since the respondents have not shown that the Salvadoran government is inclined to persecute Jehovah's Witnesses or that the government is aware of the respondents' religious beliefs, the government would presumably punish the respondents just as it would punish any other Salvadoran who refused to comply with the conscription process. The Salvadoran gov-

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ing that military service would be contrary to his "political, religious, or moral convictions." The court's use of this language in that case was mere dictum, however, as the court ultimately concluded that the petitioners had not even alleged an objection to military service that was based on reasons of conscience. *Id.* at 726-27; *see also Sarkis* v. *Nelson*, 585 F.Supp. 235 (E.D.N.Y. 1984). The respondents also rely on *Matter of Salim*, 18 I&N Dec. 311 (BIA 1982), for the proposition that aliens who object to military service may be eligible for asylum. In *Matter of A-G-*, Interim Decision 3040 (BIA 1987), we clarified the holding in *Matter of Salim*, *supra*, by pointing out that the Afghan national in *Salim* did not object to performing military service for his own government, but instead for an army that was under a foreign government's control. *See also Handbook* paragraph 165.

[11] Asylum applicants need not prove a government's "subjective" intent to persecute, although there may be evidence of such intent in some cases. Reasonable inferences can be drawn from governmental or individual actions. If, for example, a law provided exceptions for all but those with particular religious beliefs, or was neutral on its face but enforced only against those with particular religious convictions, such cases would be presented in a very different light from this one. *See Handbook* paragraphs 56-60.

ernment may penalize the respondents for their decision concerning military service, but it is apparent that any punishment imposed would relate to the respondents' ultimate choice not to serve in the military, rather than the reasons or beliefs underlying the respondents' choice. In this regard, the respondents have not demonstrated that the Salvadoran government would regard the fact that the respondents have religious reasons for their refusal to serve in the military as anything but a matter of coincidence.

To conclude that the application of the Salvadoran government's conscription law to Jehovah's Witnesses inherently amounts to "persecution" would require that we condemn the Salvadoran government for not allowing the same exemptions from military service which this nation has allowed.[12] Although the Salvadoran government's conscription process may not be as advanced or enlightened as the process in this country or other countries has been, the respondents have not shown that the Salvadoran government's motivation in establishing or carrying out this process is the persecution of Jehovah's Witnesses, or persons generally with religious objections to military service. Thus, we conclude that the respondents have not demonstrated eligibility for asylum by virtue of their conscientious objection to military service argument.

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[12] We note too that a finding that these respondents are victims of religious persecution would require a concomitant finding that the persons who enacted or who carry out the Salvadoran conscription laws have "ordered, . . . assisted, or otherwise participated in the persecution" of others "on account of . . . religion," thereby rendering all such persons ineligible for asylum pursuant to section 101(a)(42)(3) of the Act, 8 U.S.C. § 1101(a)(42)(B). *See Matter of Fuentes*, Interim Decision 3065, at 5-6 (BIA 1988).

The respondents also advance the argument on appeal that if they were returned to El Salvador and refused to perform military service, the government would regard them as "subversives" or "guerrilla sympathizers" and subject them to "extra-judicial sanctions." The respondents therefore argue that they are eligible for asylum because the government would "impute" the political opinions of "subversives" or "guerrilla sympathizers" to the respondents and then persecute the respondents for those opinions.

The respondents do not base their "imputed political opinion" argument on their particular circumstances but contend that any male who refuses to perform military service in El Salvador is subject to extra-judicial sanctions including torture and death.[13] We rejected a similar argument in *Matter of A-G-*, Interim Decision 3040 (BIA 1987). In that case, we found that a Salvadoran who claimed that he would

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[13] The respondents have submitted affidavits in support of this argument. Several of the affiants state that those who refuse to join the military in El Salvador are tortured or killed (Exh. 5C at 336; Exh. 5E at 4). Others state that those who resist induction into the military are regarded as guerrillas or guerrilla sympathizers by the army (Exh. 5A at 3; Exh. 5B at 3). A former lieutenant colonel in the Salvadoran army states:

> If a man were ordered to report for the draft and did not show up, he would be subject to court martial. Refusal to join the Army would result in a jail term. If the person becomes vocal in his opposition, he would become a real target for government persecution.

(Exh. 5D at 6). According to a Library of Congress report concerning military service in El Salvador, persons who fail to report for military duty in time of war are subject to 1-3 years imprisonment. *See* Exhibit 2 attached to respondents' brief in support of appeal.

be tortured or killed by "death squads" if returned to El Salvador had not established that "mere failure to serve in the military is the kind of activity which draws the attention of the persons who carry out these killings." *Id.*

With regard to the respondents in this case, it is not reasonable to suggest that the Salvadoran government, or forces beyond that government's control, would view the respondents as subversives or guerrillas, and that the respondents would then incur the risk of punishment or harm to which subversives and guerrillas in El Salvador are exposed. The respondents here are pacifists; the government may well inquire as to the reasons for the respondents' refusal to serve in the military, but would then discover that the respondents' objection to conscription was based on their religious beliefs. The government might then proceed to punish the respondents, in accordance with its conscription law, but there is no sound reason to believe that the government would view these respondents as possible military opponents. We therefore find no merit to the respondents' "imputed political opinion" argument.[14]

Because we conclude that the respondents have not shown that reasonable persons in their positions would fear persecution in El Salvador, we conclude that the respondents are not "refugees" within the

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[14] The respondents have also not shown that they can reasonably fear persecution from the guerrillas in El Salvador. Although Oscar Canas testified that the guerrillas came to his school and asked him and all his classmates to help the guerrillas by distributing leaflets, the respondent did not show that he was harmed or threatened by the guerrillas because of a political view or religious belief which he possessed.

meaning of the Refugee Act, and that they are not eligible for asylum under the Act. Because the respondents also have not demonstrated a "clear probability" of "persecution" on account of their religious beliefs, or any of the other grounds enumerated in section 243(h) of the Act, we conclude that the respondents are not eligible for withholding of deportation.

A remaining consideration in this case is whether the government may wish to extend protection to the respondents, and to persons similarly situated, as a matter of national policy. See *Handbook* paragraph 173, *supra.* The Service has not taken a formal position on appeal in this case, and the rationale for the Service's oral position has not been made clear. As noted above, we do not agree with, and are not bound by the Service's contention at oral argument that aliens similarly situated to the respondents who demonstrate that their religious beliefs are bona fide are "refugees" within the meaning of the Refugee Act. If, however, the Service is suggesting that as a matter of policy certain aliens who refuse to perform military service for religious reasons should not be returned to countries with compulsory military service, then such a policy should be implemented by regulation so that its contours can be defined and the policy can be openly announced and uniformly applied. *See* section 103(a) of the Act, 8 U.S.C. § 1103 (a); 8 C.F.R. § 2.1; 28 C.F.R. § 0.105(b). Implementation of such policy matters; however, is outside this Board's jurisdiction.

The Board's jurisdiction in this case is limited to a review of the immigration judge's decision and the determination as to whether these respondents qualify as "refugees" under the Refugee Act. *See* 8

C.F.R. § 3.1(b)(2). For the reasons set forth above, we have concluded that the respondents do not so qualify. Accordingly, because there is no relief available to the respondents under the Refugee Act, their appeal will be dismissed. The following orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

/s/ David L. Milhollan
Chairman

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
San Francisco, California

File Nos.: A 26 790 253
A 26 790 255

February 4, 1986

IN THE MATTERS OF
JOSE CANAS-SEGOVIA

and

OSCAR CANAS-SEGOVIA, RESPONDENTS

IN DEPORTATION PROCEEDINGS

CHARGE:

Section 241(a)(2)—Entry without inspection.

APPLICATION:

Asylum, Section 208; Withholding of deportation, Section 243(h); Voluntary departure, Section 244(e).

On Behalf of Respondents:

KAREN MUSALO

On Behalf of Service:

BEVERLEY PHILLIPS

ORAL DECISION OF THE IMMIGRATION JUDGE

This record relates to two respondents in deportation proceedings who are natives and citizens of El Salvador. The respondents are brothers who entered the United States in January, 1985, near San Ysidro, California, without being inspected by an immigration officer. Through counsel they have admitted all allegations in the Orders to Show Cause, Exhibits 1 and 1-A, and have conceded that they are deportable as charged. They have declined to name any country of choice should deportation become necessary. Accordingly, the court has directed El Salvador under the provisions of Section 243(a) of the Immigration and Nationality Act.

They have applied for asylum. In order to qualify for asylum, one must demonstrate a well-founded fear of persecution because of his race, religion, nationality, membership in a particular social group or political opinion. An asylum application filed during the course of a deportation hearing is also considered as a request for withholding of deportation. Under that statute the Government is precluded from returning any alien to a country where that individual's life or freedom would be threatened because of any of the five statutory reasons mentioned above.

Testimony was taken of each respondent. They both appear to have testified credibly. The testimony of each corroborates that of the other.

The respondents base their claim primarily on the fact that they are adherents to the principles of the Jehovah's Witness Church. They claim that their grandmother, Theresa Molina, was the first member of the family who was a member of Jehovah's Witnesses, Exhibit 9. Their cousin, Jorge Segovia, be-

came a Jehovah's Witness at some time in 1975 or 1976. The two respondents began going to the Kingdom Hall in the South Congregation in San Salvador from approximately 1977 to the time of their departure. Their church activities were interrupted for several months in a time of their life when they were afraid to leave the house for fear of conscription. They stated that in El Salvador they had read the *Watchtower* publication; they engaged in discussions; they were serious students of the religion. They went to the Kingdom Hall on Sundays and Wednesdays.

The respondents stated that in San Francisco, they continue to study the principles of this religion. This is borne out by Exhibit 9, the affidavit of the grandmother. They both discussed the tenets of the religion. Their testimony parallels that of the background evidence submitted in Exhibit 3. They stated that the Jehovah's Witness Church prohibits the use of alcohol or drugs. One must study diligently before being baptized into the religion. It is not unusual for an individual to be baptized after his adolescence, in that one needs considerable knowledge to be admitted into the Kingdom Hall. The respondents both stated that they are adhering to these beliefs. Both of them have refrained from alcohol or drugs; they both study and read the magazines; they both attend services; they both help to speak and to recruit other members.

One of the cornerstones of this religion is the refusal to take up arms or to kill another human being. They stated that if an individual takes up arms, he may not be admitted into paradise even if he obeys all other laws of God. Accordingly, they feel that if they were forcibly conscripted, they could not in conscience serve in the Salvadoran military. They

feel that this would cause them to receive a jail sentence or possibly an extra-judicial punishment such as torture or death.

The respondents recalled the methods of the government of El Salvador to conscript youths. The evidence submitted tends to support this. *See* Group Exhibit 7. They stated that although the legal draft age is 18, youths between the ages of 14 and 17 are routinely called into service. They both recalled [an] incident on a soccer field where a large group of young men were present and were taken by the military authorities to serve. They also cited that guerrillas frequently make entreaties of youths to try to get them to join their ranks.

After having witnessed the induction of unwilling youths into the army, both respondents eventually left El Salvador. They fear returning to that country because they feel they would have to serve in the military against their wishes. It is noted that both of them are currently within a few months of draftable age under Salvadoran laws.

There is no suggestion by counsel or the respondents that El Salvador in any way persecutes Jehovah's Witnesses as to their religious activity. That is, there is nothing to indicate that a Jehovah's Witness is prohibited from worshipping, attending meetings or engaging in missionary work. The crux of this case is that the Salvadoran law does not allow individuals to follow their conscience and be exempted from service.

Exhibit 7 is a document from the United Nations stating that El Salvador is a country that does not recognize conscientious objector status. In fact, counsel's brief points out that of the countries named in the report: 85 allow for individuals to decide

whether or not to join the military, 15 allow for conscientious objection, 66 have no compulsory military service, 5 others do not force conscription and 39 nations have no recognition of conscientious objection.

The State Department has given an opinion in this case which is unfavorable to respondents' claim, Exhibit 4. The opinion is a standard form letter. Thus, I have given it no weight in making my decision. It does not address the factual issues in the case, nor the crucial issue of whether or not a conscientious objector should be granted asylum in this country. I have examined the document from the United Nation's High Commissioner for Refugees office, Exhibit 8. That document cites excerpts from the *United Nation's Handbook on Procedures and Criteria for Determining Refugee Status.* I have examined the provisions of that publication. It is noted that the *Handbook* was written after the passage of the Refugee Act of 1980. Thus Congress, of course, did not take into consideration this interpretation of the convention when they passed the Refugee Act.

Paragraph "C" of Mr. Henkel's letter (in Exhibit 8) states that where no alternative military service exists, and where an individual has a strong religious or moral objection to same, this "may be considered persecution." The document also states that where the punishment for evasion of the draft or desertion is meted out more severely for persons who fall within one of the five statutory categories, then this also may constitute persecution.

The United States Congress when writing the Refugee Act of 1980, determined that individuals fleeing a war-torn country would not routinely be granted asylum. They considered and rejected that provision. They decided that an individual must show he will be

singled out for persecution *because* of one of the five statutory reasons. Case law has held that in order to qualify for asylum, one must show simply a well-founded fear of persecution. On the other hand to qualify for withholding of deportation, the burden is more strict. One must show a clear probability of persecution. He must show it is more likely than not that he will be persecuted.

Turning to the record, I find the respondents have failed to show either a well-founded fear of persecution or a clear probability of persecution. Thus, the application for relief will be denied. This may be a case of first impression. It is in my own experience. I have found no case law that would state the United States has an obligation to grant asylum to individuals who do not have alternative service available to them. In making my decision, I am persuaded by the fact that the United States is not required, nor should it be required, to demand conformity of foreign governments with our constitutional and statutory protections. The record shows that El Salvador's draft laws apply to all persons equally. Jehovah's Witnesses are not singled out for persecution. A member of the Jehovah's Witness Church is required to serve in the military and has no recourse other than to face the punishment of the law. Such is the case for members of *any* religion. It is my opinion that the United States has no business examining foreign statutes to make certain they conform to our ideas of conscience. It is noted for example that there are 39 nations of the world who simply do not allow for conscientious objector status. This does not indicate to me that these governments are singling out persons of conscience for persecution. It indicates that the national policy of that country is not at the same level as our

society in providing such an exemption. Thus my decision is that since they have not shown that their fear of persecution is well-founded, or indeed that their government's policy can be considered "persecution," the applications are denied.

The remaining application asserted at the original hearing is for voluntary departure. Under the circumstances it appears that the following period is sufficient.

ORDER

IT IS ORDERED that in lieu of deportation the respondents be granted voluntary departure without expense to the Government on or before May 15, 1986, or any extension as may be granted by the District Director and under whatever conditions he may direct.

IT IS FURTHER ORDERED that if the respondent's fail to depart when and as required, the above order shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective. Respondent shall be deported to El Salvador on the charge.

/s/ J. P. Vandello
J. P. VANDELLO
Immigration Judge

February 4, 1986

APPENDIX E

STATUTORY PROVISIONS INVOLVED

1. Section 101(a)(42) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1101(a)(42), provides:

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted,

or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

2. Section 208(a) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158(a), provides:

> § 1158. Asylum procedure
>
> (a) Establishment by Attorney General; coverage
>
> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101 (a)(42)(A) of this title.

3. Section 243(h) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1253(h), provides:

> § 1253. Countries to which aliens shall be deported
>
> * * * * *
>
> (h) Withholding of deportation or return
>
> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion na-

tionality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

APPENDIX F

OFFICE OF THE
UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES

HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS

under the 1951 Convention and the 1967 Protocol
relating to the Status of Refugees

Geneva, September 1979

CHAPTER V

SPECIAL CASES

* * * * *

B. Deserters and persons avoiding military service

167. In countries where military service is compulsory, failure to perform this duty is frequently punishable by law. Moreover, whether military service is compulsory or not, desertion is invariably considered a criminal offence. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition. Desertion or draft-evasion does not, on the other hand, exclude a person from being a refugee, and a person may be a refugee in addition to being a deserter or draft-evader.

168. A person is clearly not a refugee if his only reason for desertion or draft-evasion is his dislike of military service or fear of combat. He may, however, be a refugee if his desertion or evasion of military service is concomitant with other relevant motives for leaving or remaining outside his country, or if he otherwise has reasons, within the meaning of the definition, to fear persecution.

169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution

on these grounds above and beyond the punishment for desertion.

170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience.

171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

173. The question as to whether objection to performing military service for reasons of conscience can

give rise to a valid claim to refugee status should also be considered in the light of more recent developments in this field. An increasing number of States have introduced legislation or administrative regulations whereby persons who can invoke genuine reasons of conscience are exempted from military service, either entirely or subject to their performing alternative (i.e. civilian) service. The introduction of such legislation or administrative regulations has also been the subject of recommendations by international agencies.[24] In the light of these developments, it would be open to Contracting States, to grant refugee status to persons who object to performing military service for genuine reasons of conscience.

174. The genuineness of a person's political, religious or moral convictions, or of his reasons of conscience for objecting to performing military service, will of course need to be established by a thorough investigation of his personality and background. The fact that he may have manifested his views prior to being called to arms, or that he may already have encountered difficulties with the authorities because of his convictions, are relevant considerations. Whether he has been drafted into compulsory service or joined the army as a volunteer may also be indicative of the genuineness of his convictions.

* * * * *

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[24] Cf. Recommendation 816 (1977) on the Right of Conscientious Objection to Military Service, adopted at the Parliamentary Assembly of the Council of Europe at its Twenty-ninth Ordinary Session (5-13 October 1977).

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Supreme Court, U.S.
FILED
APR 15 1991
OFFICE OF THE CLERK

(2)

No. 90-1246

In The

Supreme Court of the United States

October Term, 1990

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JOSE ROBERTO CAÑAS-SEGOVIA, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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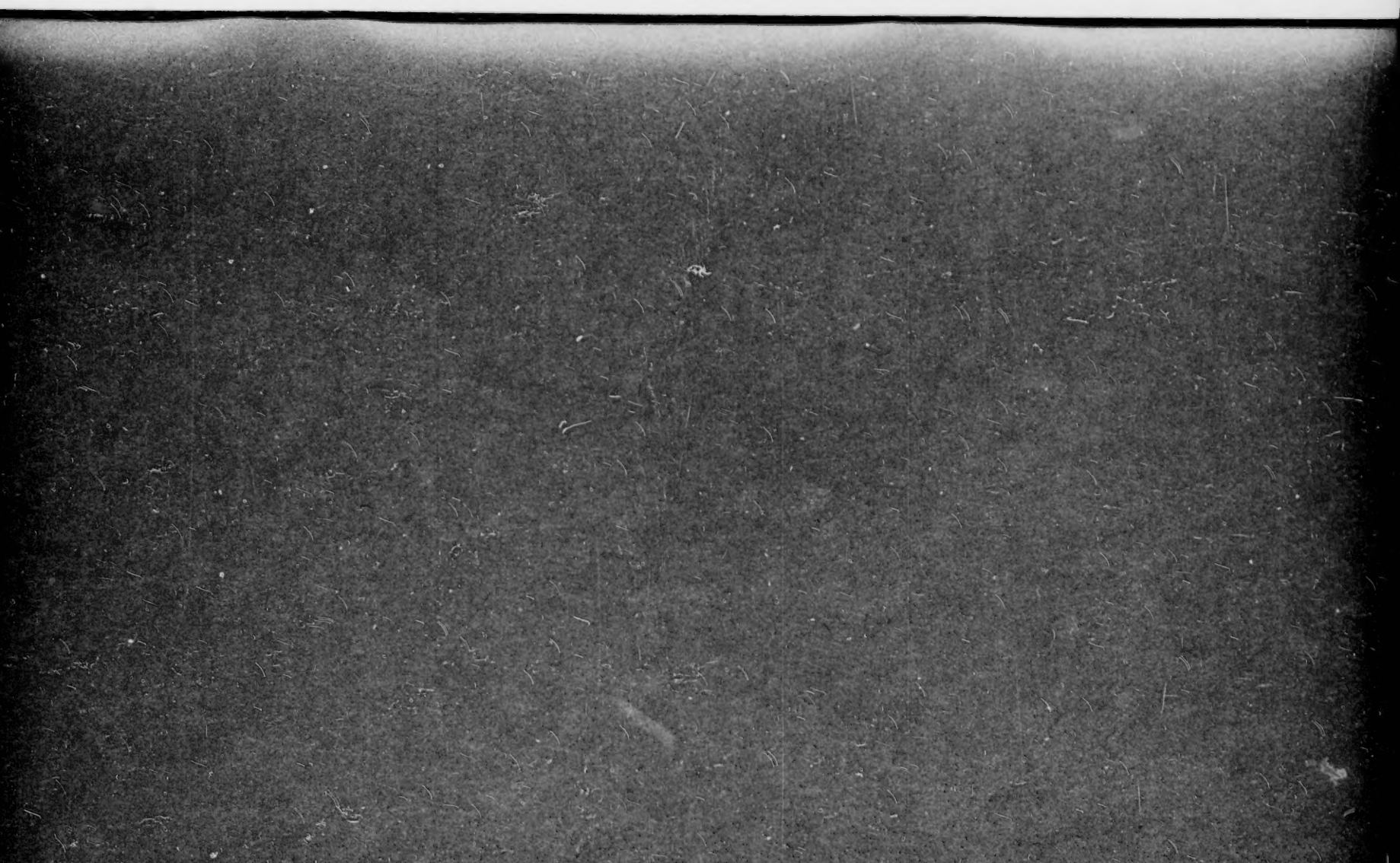

QUESTION PRESENTED

Does the lengthy imprisonment, disappearance, torture, or assassination of a conscientious objector for his refusal to serve in the military constitute (1) persecution or a threat to life or freedom on account of religion or, (2) persecution or a threat to life or freedom on account of imputed political opinion, within the meaning of the 1980 Refugee Act?

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STATEMENT

Respondents Jose and Oscar Cañas-Segovia are natives of El Salvador. On January 24, 1985, at the ages of 16 and 17, respectively, they fled El Salvador to avoid forcible recruitment into the Salvadoran military. Administrative Record (hereinafter "AR") 143-145, 149-151. The Cañas brothers are sincere Jehovah's Witnesses. Appendix to Petitioner's Petition for a Writ of Certiorari (hereinafter "Pet.'s App.") 54a-55a. A central tenet of their religion is non-participation in military service in any form. AR 532-533.

Military service is obligatory for all Salvadorans between the ages of eighteen and thirty. AR 93. Although there are written procedures requiring young men to report for duty, the actual practice is one of forcible recruitment affecting primarily the sons of the poor, and often includes the round-up of teen-age boys well below the legal age. AR 95-97, 131, 133, 538-540.

Salvadoran law does not provide for conscientious objection to military service, and individuals who refuse to serve are punished as deserters. AR 567, 572. The legal penalties for refusing to perform military service range from six months to fifteen years imprisonment,[1]

---

[1] The Petitioner asserts that the term of imprisonment is unclear. Petition for Writ of Certiorari (hereinafter "Pet.") 5, n.1. The term of imprisonment is codified in the *Codigo de Justicia Militar y Ley de Procedimientos Penales Aplicables Al Suspenderse Las Garantias Constitucionales* art. 137-139 (1986) (El Salv.). The relevant articles were submitted as Appendix C to the Cañases' Opening Brief to the Ninth Circuit Court of Appeals.

depending upon the circumstances. In addition to the legal penalties, individuals who refuse to perform service are presumed to be disloyal to the government, and are often disappeared, tortured or assassinated. AR 114-130, 166-195, 388-400, 421-422, 483-484.

Jose and Oscar Cañas-Segovia entered the United States without inspection, on January 26 and 27, 1985, respectively, and were arrested by the Immigration and Naturalization Service (hereinafter "INS"). The INS instituted deportation proceedings against them on January 28, 1985. AR 364-367.

At a hearing before an immigration judge on April 11, 1985, the Cañas-Segovia brothers conceded deportability and applied for asylum and withholding of deportation pursuant to the 1980 Refugee Act, Pub. L. No. 96-212, 94 Stat. 102. Eligibility for the discretionary relief of asylum is established upon a showing of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. . . . " 8 U.S.C. §§ 1101(a)(42)(A), 1158(a), Immigration and Nationality Act, as amended (hereinafter "INA") §§ 101(a)(42)(A), 208(a). Eligibility for the mandatory relief of withholding of deportation is established upon proof that the applicant's "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §1253(h)(1), INA §243(h)(1).

Jose and Oscar Cañas-Segovia argued that their imprisonment, and likely disappearance, torture or assassination for adhering to their religious beliefs would

constitute persecution on account of religion and imputed political opinion. AR 230.

The Cañases requested that the immigration judge consider the guidance contained in the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979) (hereinafter "*Handbook*"). AR 239-243. The *Handbook* provides significant guidance in interpreting the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (hereinafter "Protocol"), to which Congress sought to conform U.S. law, when it passed the 1980 Refugee Act. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

Chapter V of the *Handbook* contains a section entitled "Deserters and persons avoiding military service". *Handbook*, pp. 39-41. The *Handbook* states the general rule that prosecution and punishment for draft evasion or desertion does not constitute persecution, but carves out two basic exceptions. The first is when the individual suffers disproportionately severe punishment for the offense on account of race, religion, nationality, membership in a particular social group, or political opinion. *Handbook* ¶169. The second is when the individual's refusal to serve in the military is based on "genuine political, religious or moral convictions, or . . . valid reasons of conscience." *Handbook* ¶170. Individuals who base their claim for asylum on refusal to serve for reasons of conscience must show that their convictions are genuine, and that these convictions "are not taken into account by the authorities of . . . [their home] country. . . . " *Handbook* ¶172.

The immigration judge denied relief to the Cañases, ruling that imprisonment of a Jehovah's Witness for refusing military service is not persecution. Pet.'s App. 58a-59a. The judge declined to consider the *Handbook*'s recommendation, erroneously stating that it was written after the passage of the Refugee Act and that Congress had not taken it into consideration.[2] Pet.'s App. 57a. The judge failed to rule on the question whether the disappearance, torture or assassination of the Respondents would constitute persecution on account of political opinion.

The Board of Immigration Appeals (hereinafter "Board") affirmed the immigration judge's decision. The Board held that it need not consider the *Handbook*'s recommendations, which it characterized as "ambiguous," and ruled that the punishment of religiously-motivated conduct through the application of a uniform statute is

---

[2] The Department of Justice has noted that Congress was most likely aware of the contents of the *Handbook* when it passed the Refugee Act in 1980. ("In 1979, the United Nations High Commissioner for Refugees issued a nonbinding guide to aid the Convention's signatory states in determining whether someone was a refugee. . . . We assume that Congress was aware of the criteria articulated in the *Handbook* when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the *Handbook* as an aid to the construction of the Act.") *U.S. Refugee Program: Oversight Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 24, 26 (1981) (Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, to David Crossland, General Counsel, Immigration and Naturalization Service).

not persecution on account of religion within the meaning of the Refugee Act. Pet.'s App. 43a 47a-48a. The Board held that religious persecution requires proof of the persecutor's intent or motive to target the victim for his religious beliefs or affiliation. Pet.'s App. 46a-47a.

The Board also ruled that the Respondents would not be subject to disappearance, torture or assassination for their perceived disloyalty to the Salvadoran government. Pet.'s App. 50a. Instead of considering and evaluating the extensive documentary evidence on this issue, as presented by the Cañas brothers, the Board made its factual finding upon the basis of its holding in an earlier case, *Matter of A-G-*, Int. Dec. 3040 (BIA 1987). Pet.'s App. 49a-50a.

The Court of Appeals reversed the Board's decision. Pet.'s App. 24a. The panel majority took into consideration the *Handbook*'s guidance when interpreting the meaning of "persecution on account of religion." Pet.'s App. 20a-21a. The majority also considered, but did not rely upon, the concept of an impermissible burden imposed through a neutral statute which exists in First Amendment law. Pet.'s App. 11a. The panel majority ruled that the facial neutrality of the Salvadoran conscription law did not preclude a finding of persecution, and that intent or motive of the persecutor were relevant, but not dispositive. Pet.'s App. 11a, 17a. The majority of the court ruled that the lengthy imprisonment of Respondents for adhering to their beliefs would constitute persecution on account of religion within the meaning of the 1980 Refugee Act. Pet.'s App. 20a-21a.

The entire panel held that the Board's factual finding that the Cañases had not established a clear probability or well-founded fear of persecution was improper because it was based not on the evidence submitted by the Respondents, but on the record in another case. Pet.'s App. 21a, 25a. The panel ruled that the Respondents' evidence established a clear probability of torture and execution on account of imputed political opinion.[3] Pet.'s App. 21a-25a.

The Office of Immigration Litigation filed a Petition for Rehearing with Suggestion for Rehearing En Banc on June 7, 1990. The Court of Appeals denied the Petition on October 9, 1990. The Petitioner filed a timely Petition for Writ of Certiorari with this Court on February 6, 1991.

REASONS FOR DENYING CERTIORARI

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit is correct, supported by both the Refugee Act's plain language and its legislative history. Because Congressional intent is clear,

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[3] The court referred to the numerous affidavits and declarations documenting the extrajudicial sanctions imposed on persons who refuse military service, and stated: "A few examples will suffice. . . . An affidavit was presented from an eyewitness to the extrajudicial torture of an Army deserter. The eyewitness, a conscript himself, first heard army officials accuse the deserter of being an antigovernment guerrilla and then watched as both of the deserter's arms were chopped off." Pet.'s App. 4a.

the Ninth Circuit did not err in refusing to defer to the Board.

A review of the refugee definition in the 1946 Constitution of the International Refugee Organization, 62 Stat. 3037, (hereinafter "IRO"), the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (hereinafter "Convention") and the 1967 Protocol, along with the definition's rich interpretive history, lends additional support to the Ninth Circuit's ruling.

There is no conflict in the circuit courts regarding the issue of refugee status for conscientious objectors, or the related issue of the *Handbook*'s significance in interpreting the Refugee Act.[4] The decision of the Fourth Circuit in *M.A. A26851062 v. INS*, 899 F.2d 304 (4th Cir. 1990), which the Petitioner argues conflicts with the case at bar, conflicts only as to factual findings, and not as to legal determinations. It is not appropriate for this Court to exercise its jurisdiction to resolve factual issues. *See NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269 (1962); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Declining to review this decision will not result in an opening of the floodgates, as predicted by the Petitioner,

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[4] Although the *Handbook* is not binding, the federal courts and the Board of Immigration Appeals have consistently referred to it for guidance in interpreting the 1980 Refugee Act. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Turcios v. INS*, 821 F.2d 1396 (9th Cir. 1987); *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985); *Caraval-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984); *Matter of Vigil*, Int. Dec. 3050 (BIA 1988); *Matter of A-G-*, Int. Dec. 3040 (BIA 1987).

because the decision is narrowly drawn and only protects a limited category of persons intended to be protected by the 1980 Refugee Act.

ARGUMENT

I.

THE COURT BELOW CORRECTLY INTERPRETED AND APPLIED THE 1980 REFUGEE ACT

The Petitioner argues that the Ninth Circuit erred in its interpretation and application of the statutory phrase "on account of" and in its favorable consideration of the *Handbook*. Pet. 17-20, 22-23. A brief discussion of the merits will demonstrate that the Ninth Circuit's decision was correct.

a. The plain language and legislative history of the Refugee Act, as well as the historical origins of the definition of refugee in the 1980 Act support the Ninth Circuit's interpretation of the phrase "on account of"

Congress passed the 1980 Refugee Act to bring the U.S. into compliance with its obligations under the Protocol. *See* H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 2, at 19, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 160; S. REP. NO. 256, 96th Cong., 2d Sess. 4, 9, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 144, 149. The refugee definition, which was drawn from the definition

in the Convention and Protocol[5], was intended to give the United States "sufficient flexibility to deal with [refugee] crises. . . . " 126 CONG. REC. 4499 (1980). Individuals to be protected were those who fled "tyrannical or oppressive governmental regimes", 126 CONG. REC. 4501 (1980), including "prisoners of conscience." 126 CONG. REC. 4499 (1980). The Petitioner proposes a definition of refugee which requires a showing of specific intent to persecute. This requirement eliminates the flexibility written into the Act and therefore violates clearly expressed congressional intent.

Congress used the words "on account of" to describe the necessary relationship between the feared persecution and the race, religion, nationality, social group, or political opinion of the victim. The dictionary meaning of "on account of" is "for the sake of, by reason of, because of". Webster's Third New International Dictionary, 13 (1961). This terminology allows for a broad inquiry into the causal relationship between the harm and the victim's status or belief, and expresses the flexibility intended by Congress. Applying the literal definition to the case at bar, the harm suffered by the Cañases is on account of religion, because they suffer such harm "for the sake of, by reason of, because of" their religion.

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[5] The Protocol incorporated the Convention's definition of refugee, and varies from it only by eliminating the requirement contained in the Convention that the refugee causing events occurred prior to January 1, 1951. *Handbook*, p. 4, ¶9.

There is nothing in the language "on account of" to suggest that the motives of the persecutor are determinative. If Congress intended the interpretation urged by the Petitioner, i.e., that "on account of" be determined exclusively in reference to the persecutor's motivation, Congress could have so written the statute.

The definition of refugee in the Convention and Protocol, which was incorporated into the 1980 Refugee Act, has its origins in the Constitution of the International Refugee Organization. The Petitioner argues that the IRO Constitution, the Convention and Protocol, support its reading of "on account of." Pet. 18-19. A review of these instruments, and the events surrounding their drafting, demonstrate that the Petitioner is incorrect.

The IRO Constitution, which was drawn up after World War II, defined as refugee not only victims of Nazism, Fascism and similar regimes, but persons who had "valid objections" to returning to their home country. IRO Constitution, Annex 1, Pt. 1, § A1(a)-(c), § C(1), 62 Stat. 3037, 3049, 3050. A valid objection could be established by a showing of past persecution, or a fear of persecution because of race, religion, nationality or political opinion. IRO Constitution, Annex 1, Pt. 1, § C(1)(a)(i), 62 Stat. 3037, 3050. More importantly, a valid objection could be established by demonstrating political disagreement or dissent to the regime in power. IRO Constitution, Annex 1, Pt. 1, § C(1)(a)(ii), 62 Stat. 3037, 3050-51.

Commentators have remarked upon the generous parameters of the IRO definition. "The basic notion . . . underlying the IRO definition was that an individual who might be described as a victim of state intolerance or

as a genuinely motivated political dissident was a refugee. . . . " Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 Int'l. & Comp. L.Q. 348, 376 (1984). During the drafting of the IRO definition, the United States and its allies were among those groups advocating such a generous definition; they "argued strongly that individuals had the right to choose to migrate in search of personal freedom." *Id.* at 374.

The Convention definition was derived from the IRO, and there is no evidence that it was intended to be narrower in scope. To the contrary, while the IRO referred to persecution for reasons of race, religion, nationality or political opinion, the Convention extended the definition to "membership of a particular social group". Convention, Art.1(A)(2), 189 U.N.T.S. 152.

A noted commentator, A. Grahl-Madsen, referred to the social group category as having a "broader application than the combined notions of racial, ethnic, and religious groups" and wrote that its inclusion was "to stop a possible gap" in the scope of the Convention's coverage. Grahl-Madsen, *The Status of Refugees in International Law*, 219 (1966). The Protocol, which the U.S. signed in 1968, adopted the Convention definition.

The *Handbook*'s recommendation that conscientious objectors be recognized as refugees is an additional and compelling factor for rejecting the Petitioner's interpretation of "on account of". Congress intended to bring U.S. law into conformity with the Protocol, and the *Handbook*, although not binding, is a significant source of guidance for interpreting the terms of the Protocol. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

The *Handbook* does not limit "on account of" in the fashion urged by the Petitioner. It discusses persecution for reasons of religion in ¶¶71-73, and provides, *inter alia*, that religious persecution may take the form of prohibition of religious membership, worship or instruction. The *Handbook* in no way makes an exception for persecution by way of a neutral statute.

Furthermore, the *Handbook* specifically recognizes conscientious objectors under these circumstances to be refugees, and the UNHCR has stood behind the *Handbook*.[6] Contrary to the Petitioner's assertion, the majority of Protocol signatories that have considered the issue, have followed the *Handbook*'s guidance.[7] The Petitioner's

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[6] *See* Letter from Joachim Henkel, Deputy Representative of the UNHCR, to Karen Musalo (January 30, 1986): "UNHCR takes the view . . . that, especially where no alternative to military service exists, significant punishment for refusal to perform military service, based on strong religious or moral convictions, or on political opinion, may be considered persecution." AR 578. The Petitioner contends that the UNHCR has taken inconsistent positions. Pet. 22, 23. But the UNHCR's statements as early as 1981 are consistent with the current position. *See, e.g.*, UNHCR Legal Bulletin, No. 6, March 13, 1981, p.7 "[R]efusal to perform military service, based on strong religious or moral convictions, can today be considered as a valid ground for claiming refugee status under the Convention. . . . " AR 585.

[7] The *Handbook*'s recommendations regarding religious conscientious objectors have been followed in Germany, the Netherlands, Canada and Austria. *See* Decision of German

(Continued on following page)

contention that the *Handbook* is ambiguous is equally unfounded, as a careful reading of the relevant paragraphs will reveal.[8]

(Continued from previous page)

Federal Administrative Court of June 29, 1962 (BVerwG IC 41.60) (finding persecution on account of religion and granting refugee status to member of Nazarene sect sentenced to long term of forced labor for refusal to perform military service) cited at AR 582; Decision of Netherlands Council of State, Ref. LP 80/68 – EG/GRE, 14.3.1980 (finding persecution on account of religion and granting asylum to pacifist who faced sentence of two to three years imprisonment for refusal to serve) cited at AR 583; Decision of Canadian Immigration Appeal Board, No. V86-6161, May 5, 1987 (finding persecution on account of religion, and granting refugee status to Salvadoran Jehovah's Witness who feared forcible induction, and dire consequence, including death, for refusal); Ministerial Directive ("Erlas") of Austria of June 4, 1975, No. 22.501/4-II/0/75 (recognizing asylum for conscientious objectors) cited at AR 584. The *Handbook*'s recommendations regarding refugee status for individuals who face disproportionate punishment have also been followed. *See* Decision of German Federal Administrative Court, March 31, 1981, No. 9 C 6-80 (granting relief to Palestinian who faced disproportionate punishment for refusal to serve in Palestinian Commando group); Decision of Canadian Immigration and Refugee Board, No. V89-00924, June 8, 1990 (granting refugee status to Iraqi who faced disproportionate punishment of execution for desertion); Decision of Canadian Immigration Appeal Board, No. T89-05407, May 31, 1990 (granting refugee status to Salvadoran who feared disproportionate punishment for desertion).

[8] Petitioner argues that "some paragraphs of the *Handbook* suggest that religious conscientious objectors 'may be able to establish a claim to refugee status,' ¶172, while others imply the opposite, see ¶¶167, 173." Pet. 22. The argument that these

(Continued on following page)

The Petitioner states that Congress did not intend "in circumstances such as these" to provide relief for religious or political conscientious objectors.[9] Pet. 20. The Petitioner does not cite to anything in the legislative history to support its assertion, and it cannot. As discussed above, the legislative history of the 1980 Refugee Act supports the opposite conclusion. Although it is true, as the Petitioner states, that this Court has not recognized conscientious objection as a constitutional right, the United States, along with other member states, adopted by consensus a resolution in the United Nations Commission on Human Rights recognizing conscientious objection as "a legitimate exercise of the right of freedom of thought, conscience and religion" protected by the

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(Continued from previous page)

paragraphs are in conflict is absurd; ¶167 sets forth the general rule that fear of prosecution and punishment *without more* is not a basis for asylum, while ¶172 sets forth the exception to the general rule for religious conscientious objectors. Paragraph 173 stresses the need to consider the developing trend towards recognition of the right to conscientious objection. This certainly does not imply that such individuals should not be considered as refugees; rather it implies the opposite.

[9] It is not clear what the Petitioner means by its phrase "in circumstances such as these. . . . " It is difficult to imagine a set of more compelling facts. The Respondents in this case are conscientious objectors by reason of religious convictions, a basis for objection that has long been accepted in the United States. They are members of the Jehovah's Witnesses, a religion that is known for its unwavering position of conscientious objection, and the harm they face is not simply imprisonment, but torture or execution.

Universal Declaration of Human Rights,[10] G.A. Res. 217(111), U.N. Doc.A/810, at 7 (1948), and the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) (entered into force, Mar. 23, 1976). *Draft Report of the United Nations Commission on Human Rights*, U.N. Doc. E/CN.4/1989/L.10/Add.15 (March 9, 1989) For the text of the resolution, *see* U.N. Doc. E/CN.4/1989/L.11/Add.8 (March 9, 1989).[11]

b. The Board's interpretation is entitled to little deference because it is contrary to Congressional intent, and it is neither longstanding nor consistent

The Petitioner contends that the Ninth Circuit should have deferred to the Board in its interpretation of the statutory phrase "on account of." Pet. 23. The Board's interpretation is not entitled to deference because it contradicts the clear intent of Congress, as discussed in

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[10] Congress clearly intended to provide protection to individuals in the exercise of those rights contained within the Universal Declaration of Human Rights. *See* S. REP. No. 256, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2, 146-7 (in determining which refugees are of "special concern" to the United States, Congress has "respond[ed] to the human rights concerns embodied in the Universal Declaration for [sic] Human Rights."

[11] This resolution was introduced by Spain, and sponsored by Austria, Canada, Costa Rica, France, Germany, Hungary, the Netherlands, Spain, and Sweden. Subsequently, Portugal and the United Kingdom joined on as sponsors. It was adopted by consensus, and the only country that stated it would have voted against the resolution had it gone to a vote was Iraq.

section II.a.[12] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 476 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.") *See* Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2092 (1990) (noting that *Chevron* "recognizes the primacy of legislative instructions over administrative will.")

Furthermore, this Court has held that agency positions which are inconsistent are entitled to little deference. *INS v. Cardoza-Fonseca*, 480 U.S. at 446, n.30 ("An additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years.") *See also*: *Federal Deposit Ins. Corp. v. Philadelphia Gear Corp.*, 476 U.S. 426, 431 (1986) (where an agency's definition of a statutory term had been "developed and interpreted . . . for many years within the framework of the complex

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[12] In addition, the plain language of the statute indicates that Congress *did not* intend to delegate to the INS the task of interpreting the substantive terms of the Refugee Act. The authority delegated to the Attorney General was specifically limited to the establishment of procedures for applying for asylum. *See* 8 U.S.C. §1158(a) ("The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum . . . ") A recurrent theme in the legislative history was the concern of Congress about the unfettered discretion over refugee admissions vested in the Executive branch. *See* Anker and Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 34, 36, 47-48, 88-89 (1981).

statutory scheme . . . " it was entitled to considerable deference) *Chemical Mfrs. Ass'n. v. Natural Resources Defense Council*, 470 U.S. 116, 134 (1985) (affirming agency's position, noting that "we are not dealing with an agency's change of position with the advent of a different administration, but rather with EPA's consistent interpretation since the 1970's.").

The Board's decision in this case is totally inconsistent with its previous decisions. In every published decision prior to its decision in *Cañas* the Board applied the relevant *Handbook* paragraphs in cases involving refusal to serve in the military. *See, e.g., Matter of Vigil*, Int. Dec. 3050, at 10 (BIA 1988); ("[A]n alien who has refused to perform military service could qualify as a 'refugee'. . . . by showing . . . disproportionate punishment. . . . " citing to *Handbook*, p.40); *Matter of A-G-*, Int. Dec. 3040, at 6 (BIA 1987) ("Exceptions to this rule [that it is not persecution to require military service] may be recognized . . . where a disproportionately severe punishment would result . . . or where the alien would . . . be required to engage in inhuman conduct. . . . " citing to *Handbook*, pp.39-41).

Furthermore, the Board has granted asylum and withholding to individuals who merely alleged refusal to serve, without raising reasons of conscience. *See e.g., Matter of Salim*, 18 I&N Dec. 311 (BIA 1982); *Matter of Noory*, BIA unpublished dec. File No. A24 001 415 (argued Oct. 28, 1985); *Matter of Momen*, BIA unpublished dec. File No. A27 026 208 (argued Oct. 10, 1985). The Board's abrupt departure suggests the infusion of improper ideological factors in the decision-making process, which also

violates congressional intent.[13] *See* S. REP. No. 256, 96th Cong., 2d Sess. 4. *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 144. ("[The Refugee Act] finally eliminates the geographical and ideological restrictions now applicable. . . . ")

ARGUMENT II

THERE IS NO CONFLICT IN THE CIRCUITS ON THE ISSUE OF CONSCIENTIOUS OBJECTION AS A BASIS FOR ASYLUM

The Petitioner asserts that the Ninth Circuit's decision conflicts with the decision of the en banc Fourth Circuit in *M.A. A26851062 v. INS*, 899 F.2d 304 (1990). To the extent that the two cases involve overlapping issues, *M.A.* is in accordance with the case at bar. The Fourth Circuit accepted, as did the Ninth Circuit, the relevancy of the *Handbook* when applying the Refugee Act to claims based upon a refusal to perform military service.

However, there are significant procedural and substantive differences between the cases. *Cañas-Segovia* came before the court on a petition for review of the Board's denial on the merits, while *M.A.* came before the court on a motion to reopen. The applicants in *Cañas-Segovia* based their refusal to serve on religious convictions, as contrasted with the applicant in *M.A.* who

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[13] In the recent court approved stipulated settlement agreement of a major class action lawsuit, the INS explicitly agreed that ideological factors and foreign policy considerations are not relevant factors in determining eligibility for asylum. *American Baptist Churches v. Thornburgh*, Civ. No. C-85-3255 RFP, slip op. at 2 (N.D. Cal. 1991).

refused due to political convictions. In both cases it was alleged that the refusal to serve would result in imprisonment, disappearance, torture, or death.

The Fourth Circuit ruled that the Board had not abused its discretion in holding that *M.A.* did not meet the requirements of *Handbook* ¶171.[14] *Id.* at 312-314. The Fourth Circuit also held that *M.A.* had not established that any harm that might befall him would be disproportionate on account of any of the enumerated grounds, as required under ¶169. *Id.* at 315.

The Ninth Circuit found that the Cañas brothers had shown the genuineness of their religious convictions, as well as the lack of any exemption, as required by *Handbook* ¶¶170, 172. Pet.'s App. at 20a-21a. Furthermore, the Ninth Circuit found that the harm would be disproportionate, within the meaning of ¶169. Pet.'s App. at 21a-24a.

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[14] *Handbook* ¶171 applies to the individual who refuses military service as a result of his political convictions. It states in relevant part: "It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could. . . . in itself be regarded as persecution." The Board interpreted ¶171 to require a U.N. Resolution condemning the military activity, as well as evidence that the atrocities were the policy of the Salvadoran government, and that M.A. would personally have to participate in them if he served in the military. *Matter of A-G-*, Int. Dec. 3040, at 6, 7 (BIA 1987).

The plain facts of the cases, and the holdings of the two courts, simply do not support the Petitioner's contention that there is a conflict as to legal issues. For this reason, the Petitioner avoids the facts, and relies upon a selective and misleading use of the Fourth Circuit's decision. For example, the Petitioner quotes from *M.A.*: "International law and Board precedent are very clear that a sovereign nation enjoys the right to enforce its law of conscription, and that penalties for evasion are not considered persecution." Pet. 14. This language, with nothing more, creates the impression that the Fourth Circuit rejects all claims based upon a refusal to perform military service, including those of conscientious objectors. This is not the case; this quoted passage from *M.A.* continues by stating that there are exceptions to this general rule. The Fourth Circuit goes on to discuss the exceptions set forth in ¶¶169, 171. *M.A.*, 899 F.2d at 312.

The Petitioner attempts to convince the Court that the Fourth and Ninth Circuits are in conflict by asserting that "M.A. would undoubtedly have been granted relief in the Ninth Circuit" as a political conscientious objector. Pet. 15. Yet the Ninth Circuit itself distinguished the evidence in *M.A.* from the evidence presented in *Cañas*, noting that the applicant in the former case "presented no evidence linking a failure to serve in the military with torture or death" while the Cañases had submitted this evidence. Pet.'s App. 22a.

The Petitioner attempts to bolster its assertion that *M.A.* would have prevailed in the Ninth Circuit by pointing to the court's decision *Barraza-Rivera v. INS*, 913 F.2d 1443 (9th Cir. 1990) in which a political conscientious objector was granted relief. The Petitioner's assertion is

somewhat akin to declaring that after the case of *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984) (granting relief to a union member) union members will always be granted relief in the Ninth Circuit. Asylum determinations are extremely fact specific; the facts in *Barraza-Rivera* were quite different from *M.A.* Whereas *M.A.* feared being recruited and ordered to carry out atrocities, and anticipated persecution upon a refusal to do so, the applicant in *Barraza-Rivera*, had been recruited, and while serving in the military was ordered to carry out an assassination, and told that he would be killed if he refused to do so. 913 F.2d at 1446.

In a final attempt to create a conflict in the circuit courts where none exists, the Petitioner focuses on language in the Ninth Circuit decision that "any conscientious objection to military service . . . is an inherently political opinion." Pet. 16. The quoted language, which reflects the position of the UNHCR on this issue, was non-essential to the Ninth Circuit's decision. The court had found, based on the evidence, that the persecution of the Cañases would be for their imputed political opinion. It was superfluous to establish a secondary rationale for the political opinion basis of the holding. Nonetheless, the Petitioner seizes upon this phrase and argues that it conflicts "in principle" with decisions of the First and Eleventh Circuits.[15] It is questionable whether the quoted

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[15] The Petitioner misrepresents the holding of one of the cases it cites. *Umanzor-Alvarado v. INS*, 896 F.2d 14 (1st Cir. 1990) The Government quotes *Umanzor-Alvarado*, as follows: "Insofar as this evidence shows that the Government [of El Salvador] may punish him simply because he will not serve in

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proposition conflicts with the First and Eleventh Circuits; it is without doubt, however, that there is no conflict between the imputed political opinion rationale, which is central to the Ninth Circuit's decision, and the First and Eleventh Circuits.[16]

ARGUMENT III

DECLINING TO REVIEW THIS DECISION WILL NOT RESULT IN THE ADVERSE CONSEQUENCES ALLEGED BY THE GOVERNMENT

The Petitioner conjures up a vision of the most dire of consequences if this Court does not review the

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the Army, however, it does not show that the Government will persecute him because of his political opinion." Pet. 16, n.8. The Petitioner omitted the critical text that follows: *"The matter might well be different were Umanzor able to show that compelled military service would violate genuine pacifist beliefs."* (emphasis added). *Umanzor-Alvarado, supra,* at 15. The Petitioner's selective omission of the text creates an impression one hundred and eighty degrees from the actual meaning.

[16] Two of the cases cited by the Government accept the principle that persecution on account of political opinion includes persecution imposed for opinions not actually held, but imputed to the individual. The third case, *Umanzor-Alvarado,* is silent on this issue. *See Alvarez-Flores v. INS,* 909 F.2d 1, 4 (1st Cir. 1990), ("[C]ase law supports his contention that an imputed political opinion, whether correctly or incorrectly attributed, can constitute a ground of political persecution within the meaning of the Act."); *Perlera-Escobar v. Executive Office for Immigration,* 894 F.2d 1292, 1298 (11th Cir. 1990) (finding applicant failed to establish burden because he "failed to show that the guerrillas have imputed a political opinion to him.")

Cañas-Segovia decision. Individuals fleeing domestic strife will flow through the floodgates, resulting in "a backlash against true refugees." Pet. 13. "[A]ny draft resister subject to punishment for refusing to serve" will be eligible for relief. Pet. 24.

These predictions reveal a profound misunderstanding of the Ninth Circuit's decision. The Ninth Circuit simply ruled that two Jehovah's Witnesses who faced imprisonment, torture and death, for adherence to their religious principles, were refugees within the meaning of the Act.

Since the *Cañas-Segovia* decision, the Ninth Circuit has granted asylum in only one other case on the basis of the ruling. *Barraza-Rivera v. INS*, 913 F.2d 1443 (9th Cir. 1990) As discussed in section II, the Petitioner in *Barraza-Rivera*, a forcible conscript in the Salvadoran Army, had been ordered to participate in assassinations, or suffer the same fate for his refusal. *Id.* at 1446. The Ninth Circuit held that his refusal to follow orders to kill innocent persons was based on genuine reasons of conscience and granted him political asylum. *Id.* at 1454. This case hardly represents the opening of the floodgates portended by the Petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1991

(3)

No. 90-1246

FILED
MAY 2 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JOSE ROBERTO CAÑAS-SEGOVIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The core of the Ninth Circuit's holding in this case is that aliens who face criminal sanctions for engaging in conduct for religious or political reasons qualify for asylum and withholding of deportation *even though* the criminal sanctions are the same for all who engage in the forbidden conduct and are not intended to discriminate on the basis of religious or political beliefs. The lower court reached this remarkable result notwithstanding the requirement in the Refugee Act of 1980 that applicants for asylum and withholding of deportation establish that they have a well-founded fear of persecution, or would likely be persecuted, "*on account of* race, religion, nationality,

membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A), 1253(h)(1) (emphasis added). The court asserted that "[n]either of these standards requires an asylum applicant to establish the persecutor's intent or motive." Pet. App. 17a. Instead, the court below reasoned that the *asylum applicant's* reasons for violating a law can establish persecution "on account of" religion or political opinion. *Id.* at 20a.

The Ninth Circuit's decision in this case squarely conflicts with the en banc Fourth Circuit's decision in *M.A. A26851062* v. *INS*, 899 F.2d 304 (1990), as well as decisions of the First and Eleventh Circuits holding that the "on account of" language of the Refugee Act requires proof of the persecutor's intent. The Ninth Circuit's reasoning reflects a profound misunderstanding of the nature of persecution and thus of the structure of the governing statute. It is the *persecutor* who threatens to inflict harm. Thus, only the persecutor's state of mind is relevant to determining whether a threat is "on account of * * * religion * * * or political opinion." Even if limited to the context of military conscription, the lower court's substitution of the applicant's motive (for engaging in conduct) for that of the alleged persecutor (in threatening harm) would bestow refugee status on every draft resister who refuses to serve "on account of" his religious or political beliefs, regardless of the government's reasons for requiring military service and for refusing to make an exception in his case.

Although respondents labor mightily to reconcile the Ninth Circuit's analysis with the Refugee Act, Br. in Opp. 8-18, most of that discussion does not require a response at this stage, since it is directed to

the merits of the underlying dispute rather than to the question whether the petition should be granted.[1]

1. Respondents fail in their efforts to reconcile the Ninth Circuit's decision in this case with the en banc Fourth Circuit's decision in *M.A.* Br. in Opp. 18-20. The first proposed distinction, *id.* at 18—that M.A.'s asylum claim was made in his motion to reopen his deportation proceeding, 899 F.2d at 307—is entirely

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[1] Two brief observations are appropriate, however. First, respondents rely heavily on the *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979), published by the United Nations High Commissioner for Refugees. See Br. in Opp. 3-5, 11-13. But since respondents concede that the *Handbook* provides at most "significant guidance," Br. in Opp. 3, in construing the Refugee Act, respondents seem to agree with the government that the Ninth Circuit erred in giving "authoritative" weight to the *Handbook*. Pet. App. 13a. Respondents also appear to concede that the *Handbook*'s author, the High Commissioner for Refugees, has taken inconsistent positions on the eligibility of conscientious objectors for refugee status based solely on failure to comply with universal conscription laws. Respondents claim that the High Commissioner's latest position, which differs from her position in 1982, see Pet. 22-23, returns to the one she espoused in 1981, Br. in Opp. 12 n.6. If so, the High Commissioner has switched sides not once, but twice. Thus, by respondents' own analysis, *id.* at 15-18, the High Commissioner's views provide little guidance in interpreting the Refugee Act. More fundamentally, the High Commissioner's latest position on conscientious objectors conflicts with other paragraphs of the *Handbook*, which recognize (correctly) that "[i]f the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee." *Handbook* ¶ 84; *see id.* ¶ 56.

Second, respondents err in claiming, Br. in Opp. 16 n.12, that the agency's construction of the Refugee Act is not entitled to deference. This Court has held that the traditional deference rules apply. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

irrelevant; indeed, respondents do not even attempt to explain what difference it makes. As we note in our petition, Pet. 17 n.9, the Fourth Circuit reviewed the Board of Immigration Appeals' denial of M.A.'s motion based on his "failure to establish prima facie eligibility" for relief. 899 F.2d at 308. Since the question in *M.A.*, as here, is not the likelihood of punishment, but whether it is "on account of" religion or political opinion, the procedural posture of the two cases cannot explain the difference in results.

The second proposed distinction is that respondents are religious conscientious objectors, while M.A. was a political conscientious objector. Br. in Opp. 18-19. Again, however, respondents fail to identify the principle that explains why religious conscientious objectors deserve asylum and political conscientious objectors do not. As we note in our petition, there is no such principle.[2] In any event, the Ninth Circuit held that *all* conscientious objectors are eligible for asylum as long as their refusal to serve "is based upon genuine *political*, religious, or *moral* convictions, or *other genuine reasons of conscience*." Pet. App. 16a (emphases added). Another Ninth Circuit panel has recognized the breadth of the decision below. *Barraza Rivera* v. *INS*, 913 F.2d 1443, 1450-1451 (1990)

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[2] See *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring in result) (Congress "cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other"); Cohen & Greenspan, *Conscientious Objection, Democratic Theory, and the Constitution*, 29 U. Pitt. L. Rev. 389, 403 (1968) ("Nothing is more repugnant to a sense of fairness than the rejection of the claim of a conscientious objector because he does not believe in a transcendent reality."); Mansfield, *Conscientious Objection—1964 Term*, 1965 Relig. & Pub. Ord. 3, 76 ("[T]here are really no convincing reasons why the religious objector should be exempt and not the non-religious conscientious objector.").

(the decision below "defined conscientious objector in the asylum context broadly," beyond the "traditional form of conscientious objection" based on "religious grounds").

The third proposed distinction is the lower court's suggestion, Pet. App. 22a, that respondents presented evidence that they would be tortured and killed while M.A. did not. Br. in Opp. 20. To repeat, however, the question in these cases is not the likelihood—or severity—of harm, but whether it is "on account of" religion or political opinion.[3] On the latter point, respondents' evidence was no better than M.A.'s. In fact, one of the respondents candidly admitted: "I don't think they would care about what my religious beliefs were. What they care about is [whether] they can pick up people for fighting." Pet. App. 35a (brackets in original). The Ninth Circuit held that respondents' status as conscientious objectors, without more, satisfied the statutory "on account of" language; the en banc Fourth Circuit held that it did not.[4] The conflict between the two circuits could not be more direct.

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[3] For this reason, the *Handbook*'s recommendation (¶ 169) of refugee status for "a deserter or draft evader" subject to disproportionate punishment has no bearing on this case. Like the Refugee Act, that paragraph focuses on whether the punishment is "on account of" race, religion, nationality, membership in a particular social group or political opinion—*i.e.*, "above and beyond the punishment for desertion" or draft evasion. Pet. App. 64a (reprinting *Handbook* ¶ 169). The Ninth Circuit found the punishment to be "disproportionate" *not* because Jehovah's Witnesses receive a more severe penalty than other draft resisters, but because they would suffer more if (contrary to their convictions) they took up arms rather than went to jail. Pet. App. 22a-23a.

[4] As a factual matter, the Ninth Circuit was wrong to assert that respondents faced a more serious threat than did M.A. M.A. offered evidence that he had been threatened by a

2. The Ninth Circuit also held that conscientious objection to military service constitutes an "expression of political neutrality." Pet. App. 23a. Respondents contend that this holding is "non-essential to the Ninth Circuit's decision." Br. in Opp. 21. In one sense, respondents are correct. The Ninth Circuit's alternative holding simply seeks to convert conscientious objection (whatever the reason) from a basis of religious persecution to a basis for political persecution. It is therefore vulnerable on precisely the same ground as the principal holding. See Pet. 22.

At the same time, the Ninth Circuit's alternative holding obliterates any basis for distinguishing religious from political conscientious objectors (if *religious* conscientious objection constitutes a *political* opinion of neutrality, it follows that *political* conscientious objection must as well). It also brings the Ninth Circuit into conflict with the First and Eleventh Circuits, both of which hold that the Refugee Act requires proof of the persecutor's intent to discriminate "on account of" political opinion. See Pet. 16 & n.8. To that charge, respondents say only that "[i]t is questionable" whether the decisions conflict. Br. in Opp. 21. Not so. The Eleventh Circuit held that "the motivation of the persecutor becomes the linchpin of the analysis," *Perlera-Escobar* v. *Executive Office for Immigration*, 894 F.2d 1292, 1299 (1990) (per curiam), and the First Circuit noted that, in view of the conflict between the analysis of the Eleventh Circuit and that of the court below, the Ninth and Eleventh Circuits "appear divided on the issue" whether "persecution on account of political neutrality requires that the intention of the *persecutor* be

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civilian patrol and had been twice beaten by soldiers. 899 F.2d at 306. Respondents entered the United States before they reached the age of conscription, and the Salvadoran government was not even aware they were Jehovah's Witnesses.

the 'linch-pin' of the analysis," *Alvarez-Flores* v. *INS*, 909 F.2d 1, 8 n.6 (1990).[5] By holding that the Refugee Act does not require respondents "to demonstrate motive or intent to persecute on the part of the Salvadoran government," Pet. App. 17a, the Ninth Circuit put its ship "at some distance from the main fleet." *Mendoza-Perez* v. *INS*, 902 F.2d 760, 768 (9th Cir. 1990) (Sneed, J., concurring).

3. The Ninth Circuit's misreading of the statutory "on account of" language is not simply unfaithful to the Refugee Act, it also poses a severe administrative burden for the adjudication of asylum cases. By holding that the applicant's reasons for engaging in criminal conduct can establish that imposition of the corresponding penalties are "on account of * * * religion * * * or political opinion," the Ninth Circuit has made any "conscientious objector" to military conscription eligible for asylum and withholding of

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[5] Contrary to respondents' contention, Br. in Opp. 22 n.15, the First Circuit in *Umanzor-Alvarado* v. *INS*, 896 F.2d 14, 15 (1990), did *not* suggest that conscientious objectors are eligible for asylum. Judge Breyer wrote that evidence "that the Government may punish simply because [the applicant] will not serve" in the military "does not show that the Government will *persecute* him because of his *political opinion*." *Ibid.* Not only do respondents elide Judge Breyer's emphases, Br. in Opp. 21-22 n.15, but they err in trying to draw comfort from the statement in another paragraph that "the matter might well be different" if the applicant were a genuine pacifist. *Ibid.* The earlier sentence, as well as a later opinion by Judge Breyer, establish that the matter would *not* be different in the First Circuit. See *Novoa-Umania* v. *INS*, 896 F.2d 1, 3 (1990) (claim of persecution based on political neutrality requires proof of *persecutor's* intent in one of three forms). The sentence quoted by respondents simply paraphrases the Ninth Circuit case cited immediately thereafter; we agree that in the Ninth Circuit "the matter might well be different."

deportation. Given the number of draft-age males in countries like El Salvador, and the "incentives for draft-age males to raise asylum claims," *M.A. A26851062* v. *INS*, 899 F.2d at 315, it is not unreasonable to expect a flood of such claims from those placed in deportation proceedings in the Ninth Circuit Moreover, by making eligibility for asylum turn on the applicant's reasons for draft evasion, the Ninth Circuit has propounded an interpretation of the Refugee Act that is peculiarly susceptible to manipulation and abuse.

Respondents insist that the court below ruled only that two Jehovah's Witnesses were refugees under the Refugee Act. Br. in Opp. 23. Respondents were more candid in their opposition to our petition for rehearing en banc, where they brushed aside the "floodgate argument" with the response that the court should adopt their view of the Refugee Act "irrespective" of its "effect on potential numbers of successful claims." Resp. C.A. Reply 1 n.1.

For the foregoing reasons and those stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

MAY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE, 1991 282061 20512